(19)

No. 00-799-CFX Title: City of Los Angeles, Petitioner
v.
Alameda Books, Inc., et al.

Docketed: November 17, 2000 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Nov 17 2000	Petition for writ of certiorari filed. (Response due January 5, 2001)
	Dec 12 2000	Order extending time to file response to petition until January 5, 2001.
	Jan 5 2001	Brief amici curiae of California Cities filed.
	Jan 5 2001	Brief of respondents Alameda Books, Inc. and Highland Books, Inc. in opposition filed.
	Jan 17 2001	DISTRIBUTED for Conference of February 16, 2001
	Jan 17 2001	Reply brief of petitioner City of Los Angeles filed.
	Feb 20 2001	REDISTRIBUTED for Conference of February 23, 2001
	Feb 26 2001	REDISTRIBUTED for Conference of March 2, 2001
	Mar 5 2001	Petition GRANTED. SET FOR ARGUMENT December 4, 2001. **********
	Mar 29 2001	Order extending time to file petitioner's brief on the merits to and including May 15, 2001.
	May 2 2001	Brief amicus curiae of Capitol Resource Institute & Campaign for CA Families filed.
	May 11 2001	Brief of Morality in Media, Inc. filed.
	May 14 2001	Joint appendix filed.
	May 14 2001	Joint appendix in two volumes
	May 14 2001	Brief of petitioner City of Los Angeles filed.
	May 14 2001	Brief amici curiae of American Planning Association, et al. filed.
	May 15 2001	Brief amici curiae of U.S. Conference of Mayors, et al. filed.
	May 15 2001	Brief amici curiae of Ohio, et al. filed.
	Jun 6 2001	Order extending time to file respondents' brief on the merits to and including July 20, 2001.
	Jul 12 2001	Order further extending time to file respondents' brief on the merits to and including August 17, 2001.
	Aug 15 2001	Brief amici curiae of American Booksellers Foundation, et al. filed.
	Aug 16 2001	Brief amicus curiae of First Amendment Lawyers Association filed.
	Aug 17 2001	Brief amicus curiae of DKT Liberty Project filed.
	Aug 17 2001	LODGING consisting of twenty spiral bound copies of reports, etc. submitted by counsel for amicus First Amendment Lawyers Assn.
	Aug 17 2001	Brief of respondents Alameda Books, Inc., et al. filed.
	Aug 17 2001	Appendix of respondents filed.
	Sep 18 2001	Reply brief of petitioner City of Los Angeles filed.
	Sep 26 2001	CIRCULATED.
	Oct 10 2001	Record filed.
	Oct 12 2001	Record filed.
	Dec 4 2001	ARGUED.

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No. 00-799-CFX

Entry	Date	Proceedings and Orders
	Dec 6 2001	Letter from counsel for the respondents received and distributed.

Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a city's zoning ordinance, which prohibits the operation of more than one adult entertainment business at a single location, including an adult bookstore and an adult arcade, invalid because the city did not study the negative effects of such combinations of adult businesses, but rather relied on judicially approved statutory precedent from other jurisdictions?

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CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit was initially filed July 27, 2000, and, as amended August 28, 2000, is reproduced at Appendix ("App.") A to the petition. It is reported at 222 F.3d 719 (9th Cir. 2000). Concurrently with filing the amended opinion, the Court of Appeals denied Plaintiffs/Appellees' Petition for Rehearing. App. 2. Defendant-Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc was denied September 18, 2000, and is reproduced at App. D to the petition.

The May 28, 1998 Order of the District Court granting, *inter alia*, plaintiffs' motion for summary judgment, which was unreported, is reproduced at App. B. The Judgment and Permanent Injunction filed May 28, 1998, is reproduced at App. C.

JURISDICTION

The decision of the Court of Appeals was initially entered on July 27, 2000. App. 1.

Respondents filed a timely Petition for Rehearing by Panel, which was denied August 28, 2000. App. 2. Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing *en banc*, which was denied September 18, 2000. App. 59. The Petition for Writ of Certiorari is timely filed within 90 days of that date in accordance with Rule 13.3 of the Rules of this Court.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part that:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1983 of Title 42 of the United States Code provides in pertinent part that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Ordinance Nos. 151294, 157538 and 158579 of the City of Los Angeles are printed in Appendices E, F and G respectively.

STATEMENT OF THE CASE

A. The City of Los Angeles' Adult Entertainment Ordinance

Following this Court's decision in *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976) (*Young*), the Los Angeles City Council instructed the Planning Department to undertake a study "to determine whether and to what extent the concentration of . . . adult businesses has a blighting and degrading effect upon the neighborhoods in which they are situated." App. 60.

In June, 1977, the Planning Department completed a comprehensive study entitled "Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles." ("1977 Study"). The 1977 study documented that the concentration of adult entertainment businesses resulted in increased crime, decreased property values, and generally caused blight and other negative impacts in the neighborhoods where they concentrated[1]. Following a public hearing, the Planning

[1] The 1977 Study has been held by the federal courts, including this Court, to be a sufficient evidentiary basis to uphold ordinances from other jurisdictions regulating various aspects of adult businesses on numerous occasions. See, *e.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 236 (1990) [regulating minimum hours to rent rooms in adult motels]; *Hart Book Stores,*

Commission recommended to the City Council that it adopt an ordinance to require all adult entertainment businesses[2] be separated from each other by 1000 feet and located at least 500 feet from schools, religious institutions and parks.

On July 18, 1978, the City Council enacted Ordinance No. 151294 adding § 12.70 to the Los Angeles Municipal Code[3]. App. E. Pertinent to this lawsuit, Ordinance No. 151294 added § 12.70 C, which provided:

> "No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theater, Adult Theater, Massage Parlor or Sexual Encounter Establishment within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park within the City of Los Angeles." App. 67.

Inc., 612 F.2d 821, 829 n. 10 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980) [number of adult business at one location]; *Buzzetti v. City of New York*, 140 F.3d 134, 136 (2nd Cir. 1998), *cert. denied*, 524 U.S. 924 (1998) [location requirements].

[2] An "Adult Entertainment Business" is defined as an "Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theatre, Adult Theatre, Massage Parlor, or Sexual Encounter Establishment, as defined herein. . . . " App. 70.

[3] Section 12.70 B (1) defined an "adult arcade," and § 12.70 B (2) defined an "adult bookstore." App. 62. These definitions are not at issue here, nor do plaintiffs assert that their businesses are not adult bookstores or arcades within the meaning of the ordinance.

Section 12.70 D was also added which provided, in pertinent part:

> "The distance between any two adult entertainment businesses shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of each business." App. 67.

In 1982, it was discovered that the "measurement of distance" provision subsection D, *supra*, was being interpreted "in such a manner as to permit a combination of such businesses to be located within the exterior structural walls of a single building at one site." The intent in originally adding § 12.70 to the Municipal Code "was to provide for the dispersion of all adult entertainment business in the City," and thus "it is quite apparent that the Council in no way intended to allow more than one such business to be established at a single location in the same building." A motion was introduced to amend § 12.70 in order to remove any ambiguity about the Council's intent to disperse all adult entertainment businesses.

The matter was referred to the Council's Planning and Environment Committee, which referred the matter to the Planning Commission for study and recommendation. The Planning Commission held a public hearing on a draft ordinance to clarify the Council's legislative intent. Following the public hearing, the Planning Commission adopted the staff report and findings, and recommended the ordinance be adopted. The staff report described the need for the ordinance as follows:

> "The intent of the City Council in enacting the existing adult entertainment zoning regulations in 1978 was to provide for the dispersion

> of *all* adult entertainment business in the City. *This being the case, it is quite apparent that the Council in no way intended to allow more than one such business to be established at a single location in the same building.* However, the . . . language [in § 12.70] relating to the measurement of distances . . . has resulted in an ambiguity with respect to the number of businesses which may be permitted within the 'exterior structural wall' of an establishment at one location. . . . Thus the need has arisen to enact the . . . subject proposed ordinance."

Further, the report stated that "[e]nactment of the subject ordinance is necessary to clarify, on a permanent basis, existing provisions of the Adult Entertainment Zoning regulations contained in Section 12.70 of the Municipal Code. It is apparent that in enacting these regulations in 1978, the City Council did not intend to permit more than one adult business in the same building at one location."

On March 16, 1983, the City Council adopted Ordinance No. 157538 (App. F), amending § 12.70 to add § 12.70 B (17) to *expressly* prohibit more than one of the previously defined adult entertainment business at the same location and to make clear that "each shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." App. 70-71. Section 12.70 C was also amended at that time to specifically prohibit more than one adult business in one building. App. 71. Ordinance 158579 (App. G), enacted December

16, 1983[4], further clarified the legislative intent and resulted in the current version of the first paragraph of § 12.70 C[5], which is the subject of this litigation. Subsection C provides:

> "No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an adult entertainment business within 1,000 feet of another adult entertainment business or within 500 feet of any religious institution, school or public park within the City of Los Angeles. No person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof, or the increase of floor area of any adult entertainment business in any building, structure or portion thereof containing another adult entertainment business." App. 77.

B. The Two Plaintiffs

Alameda Books commenced operation in 1987, closed in 1990 and reopened in 1993 at a different store within the same shopping center in the City. It operates both an adult bookstore and adult video arcade with 15 viewing booths.

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[4] These amendments to § 12.70 did not change the 1000 foot separation requirement between adult businesses originally enacted in 1978 or the definitions of an "adult bookstore" and "adult video arcade" and their validity was not challenged below.

[5] This provision of § 12.70 C has been referred throughout this litigation as the "multi-use prohibition."

Highland Books began operation in the City in 1987 as an adult arcade, and, commencing in June, 1991, first began operating an adult bookstore at the same location. The adult video arcade has 19 viewing booths.

Both Alameda Books and Highland Books began operating adult bookstores and adult video arcades in the same locations well after the January 23, 1984, effective date of Los Angeles Ordinance No. 158579 (App. G). Highland Books admits that it "has been openly operating in non-compliance with this 'multiple-use prohibition' since June, 1991," and Alameda Books admits that it has "been openly operating in violation of this provision since approximately November of 1993." Further, the plaintiffs waived any argument that an adult arcade cannot economically operate independent of an adult bookstore.

C. Proceedings Below

Plaintiffs filed their Complaint for Declaratory Relief and Injunctive Relief Under 42 U.S.C. § 1983 on November 15, 1995. The First Cause of Action was for "Declaratory And Injunctive Relief Under 42 U.S.C. § 1983 To Prevent Threatened Enforcement Of Portions Of L.A.M.C. § 12.70 Prohibiting Two Or More Adult Entertainment Businesses In Same Building." The City filed its answer on March 8, 1996. The parties filed cross-motions for summary judgment or summary adjudication of the issues which were argued on October 20, 1997. The District Court denied the cross-motions for summary judgment on January 12, 1998, and set the matter for trial.

Plaintiffs filed motions to reconsider the First Amendment portion of the District Court's January 12, 1998 Order. App. 22-23. The Court heard oral argument on April 13, 1998 (App. 23), and on May 28, 1998, issued a new order granting the motion for reconsideration of the First Amendment portion of the previous order. App. 22. The new order vacated the prior order denying summary judgment (App. 54) and granted plaintiffs' motion for summary adjudication of the First Cause of Action. App. 55. The court concluded that the City's multiple use prohibition was not a content neutral secondary effects regulation and was therefore an invalid prior restraint. App. 54. The new order rendered moot the remaining causes of action in the complaint (App. 54) including whether the City's multi-use prohibition allowed "for reasonable alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (*Renton*).

Judgment was entered for the plaintiffs, and an injunction against the enforcement of Section 12.70 C was granted. App. 57-58.

The Court of Appeals for the Ninth Circuit affirmed. App. 3. Although the court conceded that the City had a substantial government interest in reducing crime in its neighborhoods, it held that the multi-use prohibition did not serve that interest because of a failure of proof. App. 11-12. The court determined that the 1977 Study was insufficient to show that this particular combination of sexually explicit adult businesses contributed to the negative secondary effects caused by the concentration of such businesses identified in the 1977 Study. *Id.* The court therefore concluded that it was unreasonable for the City to conclude that a combination of an adult bookstore and

adult video arcade would have harmful secondary effects. App. 15.

REASONS FOR GRANTING THE WRIT

The opinion of the Court of Appeals deals with an issue of federal constitutional law in a way which directly conflicts with this Court's decision in *Renton* and necessarily brings its decision into conflict with other circuit courts of appeals. The Ninth Circuit held that the City must first study the negative effects of each combination of adult businesses and then apply those findings to the particular problems or needs of the City. As discussed in Part B, *infra*, this reasoning and result are the same as in its prior decision, *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir. 1984) (*Playtime Theatres*), which this Court reversed in *Renton*.

Renton stands for the proposition that a City need not await the entry of adult businesses and the consequent negative effects before it can zone to regulate adult businesses. Further, *Renton* does not require a city council to independently investigate or corroborate each potential problem when it acts in furtherance of the public interest. All that is required is that the evidence relied on need be "reasonably believed to be relevant to the problem that the city addresses." *Renton, supra*, 475 U.S. at 50-51. The Ninth Circuit now requires that before a city can zone to regulate adult businesses the city must have direct, corroborating evidence that the regulated business contributes to the already proven negative secondary effects

associated with adult businesses, an impossible burden to meet.

As discussed in Part A, *infra*, there is, then, a substantial conflict among the circuits as to the proper standard a court should use in evaluating the constitutionality of an adult entertainment zoning ordinance. The opinion below conflicts with the decisions of the Courts of Appeals for the Third Circuit, *Mitchell v. Com'n on Adult Entertainment Est.*, 10 F.3d 123 (3rd Cir. 1993), the Eighth Circuit, *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994), *cert. denied*, 513 U.S. 1017 (1994), the Tenth Circuit, *Z.J. Gifts v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998), *cert denied*, 525 U.S. 868 (1998) and the Eleventh Circuit, *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1554 (2000). These circuits look to the purpose of the ordinance as a whole and, if it can be shown that adult entertainment businesses as a class or category contribute to the undesirable secondary effects, then the ordinance passes scrutiny under the First Amendment. They do not require a city to separately study the negative impacts of individual businesses. Rather, if evidence supports the need for zoning regulations for some adult businesses, it is constitutionally permissible to regulate all businesses that can be characterized as "adult entertainment."

The Ninth Circuit opinion in this case also conflicts with a decision of the Court of Appeals for the Fourth Circuit, *Hart Book Stores, Inc. v. Edmisten* (*Hart*), *supra*, which held that the specific zoning tool employed by the City, prohibiting more than one sexually explicit business at a location, did not violate the First Amendment. Both the trial court (App. 45) and the Court of Appeals (App.

19) agreed that the regulation in *Hart* was the same as the one adopted by the City. *Renton* permits a city's reliance on opinions such as *Hart* to support the municipal zoning regulation. *Renton, supra,* 475 U.S. at 50-51 (Renton entitled to rely on a 1978 opinion of the Supreme Court of Washington). For these reasons this case warrants review in the form of a writ of certiorari. See Rule 10(a) of the Rules of the Supreme Court of the United States.

A. The Decision Of The Ninth Circuit Court of Appeals Is In Conflict With Five Other Circuits.

At least four other circuit courts of appeals have considered and rejected the rationale used by the Ninth Circuit to invalidate the City's zoning regulation. The Ninth Circuit determined that this City's 1977 Study was insufficient to justify the City's regulation because the study (1) "did not analyze an individual bookstore/arcade combination as a concentration of adult businesses (App. 12), (2) "was not directed at determining the impact of individual adult entertainment business units (*id.*), and (3) did not "identify any harmful secondary effects resulting from bookstore/arcade combinations as individual business units." App. 13. In that court's opinion, the "Study contains no findings that an individual combination bookstore/arcade produces any of the increased crime the Study found resulting from a concentration of adult businesses." App. 15. "Therefore," said the court, "it is unreasonable for the City to infer that absent its regulations, a bookstore/arcade combination would have harmful secondary effects." *Id.*

The Ninth Circuit's standard for evaluating the constitutionality of an adult entertainment zoning ordinance has been rejected elsewhere. One circuit has stated simply: "That is simply not the law." *ILQ Investments, Inc. v. City of Rochester, supra,* 25 F.3d at 1418 (*ILQ*). In *ILQ*, the Eighth Circuit reversed a district court ruling "that the City was unreasonable in relying upon other cities' studies because they did not specifically address businesses similar to Downtown Book and Video, that is, adult bookstores 'that offer both sexually explicit and non-sexually explicit materials and allow only off-premises consumption of those materials.' " *Id.* at 1417. The Eighth Circuit rejected ILQ's assertion that Rochester had to disregard that city's studies because they did not evaluate bookstores with no on-site viewing offering both adult and non-adult fare. *Id.* at 1418.

After noting the "thorough legislative process" undertaken by Rochester in enacting its zoning regulations (*id.* at 1417), the *ILQ* court held that the evidence relied on by Rochester need not prove that the *plaintiff's business* produced "the exact same adverse effects on its surroundings" as other adult businesses. It was legally sufficient for the city to show that plaintiff's business was one of the categories of businesses "reasonably believed to produce at least some of the unwanted secondary effect." *Id.* at 1418. "Even if Downtown Book and Video is a new type of adult business, it may not avoid a time, place and manner regulation that has been justified by studies of the secondary effects of reasonably similar businesses." *Id.* Because Rochester's ordinance "affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects,

Rochester 'must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.' (Citation omitted.)" *Id.*

Based on the "more flexible" Eighth Circuit standard (App. 18), the City's ordinance is valid under *Renton* because it seeks to regulate only categories of businesses reasonably believed to produce the very serious identified secondary effects caused by concentrations of sexually explicit businesses. A concentration of sexually explicit businesses in one building is, when all is said and done, reasonably similar to, if not identical with, a concentration of adult businesses next door to or down the block from each other.

In *Mitchell v. Com'n on Adult Entertainment Est.* (*Mitchell*), *supra*, an adult bookstore and video arcade (*Mitchell, supra*, 10 F.3d at 127) challenged a Delaware statute restricting the hours of operation for sexually explicit businesses. *Id.* at 128. The plaintiff asserted that there was insufficient evidence before the legislature "to support its conclusion that the asserted undesirable secondary effects it seeks to regulate resulted from the protected activity, or if it did, that the closing-hours amendment would reduce them." *Id.* at 132. The Court of Appeals held that there was a substantial government interest in the regulation because it "was amply demonstrated that the amendment was passed to control the socially undesirable effects incidental to the operation of adult entertainment establishments." *Id.* at 137. "The perceived effects are akin to those created by a public nuisance." *Id.*

The *Mitchell* court rejected the argument that the statute was not narrowly tailored because plaintiff's particular location was not shown to contribute to the identified adverse effects. It also rejected the argument that a survey of adult bookstores in Delaware was required in order to "determine the effect the statute or regulation will have on each." *Id.* at 138. Rather, the court concluded that the state "need only show that adult entertainment establishments *as a class* cause the unwanted secondary effects the statute regulates." *Id.*, emphasis added.

The Ninth Circuit's decision below conflicts with yet a third Court of Appeals decision, *Z.J. Gifts v. City of Aurora, supra*. The City of Aurora, Colorado, enacted a zoning ordinance which, *inter alia*, regulated a bookstore that sold and rented adult materials for viewing off premises. *Z.J. Gifts, supra*, 136 F.3d at 685. The district court enjoined the ordinance "because it believed 'none of the material relied on by the city council shows the business of Christie's bears any relationship to [harmful secondary] effects.' " *Id.* at 686. The Court of Appeals reversed, rejecting in the Tenth Circuit the rationale used by the Court of Appeals here.

The *Aurora* court held that the evidence relied on to justify the ordinance need only support the City's general purpose in enacting the ordinance, and that "differences in the mode of delivery of sexually oriented materials are constitutionally insignificant for purposes of determining an ordinance's content-neutrality." *Id.* at 687. The court's "analysis of Aurora's interest in regulating sexually oriented businesses thus remains unaffected by the district court's distinction between off-site and on-site viewing of sexually explicit materials." *Id.* at 688. The ordinance

regulated the category of businesses producing the unwanted secondary effects (*id.* at 687) and did not attempt to regulate businesses that had "a minimal or nonexistent connection to sexually oriented entertainment." *Id.* at 689. Therefore, the bookstore owner could not be heard to complain that the zoning regulations could not be constitutionally applied to it because it was a new or different type of sexually oriented business. *Id.* at 690.

Here, as in *Z.J. Gifts*, the characterization of the combination of an adult bookstore and adult video arcade as a new or unique type of business (as is, by the way, any other conceivable combination of adult businesses within the City) should not affect the underlying analysis that these types of businesses collectively cause serious negative impacts. Given the uncontroverted explicit sexual nature of these businesses, they should not be permitted to avoid regulation by creating an artificial distinction based upon the mode or manner of operation because such a "distinction is constitutionally irrelevant in determining whether [Los Angeles'] interests are important or substantial, particularly in light of the [Supreme] Court's strong statements regarding the government's interest in regulating such businesses in *Young* and *Renton*." *Id.* at 688.

The Court of Appeals for the Eleventh Circuit recently rejected the rationale of the Ninth Circuit below in *Lady J. Lingerie, Inc. v. City of Jacksonville (Lady J.), supra*, 176 F.3d at 1365. In *Lady J.*, " 'lingerie shops' that showcase(d) nude dancing" (*id.* at 1360) challenged, *inter alia*, the city's regulation limiting their hours of operation. *Id.* at 1365. The Eleventh Circuit rejected the argument raised

by the plaintiffs, which was identical to the rationale used by the Ninth Circuit below. The lingerie shops argued that Jacksonville needed to show a substantial government interest to justify its regulation on an hour-by-hour basis. *Id.* The Court of Appeals rejected the argument:

> "The plaintiffs concede that ample evidence exists to justify requiring them to close during the late evening hours, so that the hours of operation rule *as a whole* indisputably serves a substantial government interest. Both the plaintiffs would have us look at the City's reasons for this rule on an hour by hour basis. There is no evidence, they submit, of a substantial government interest to justify requiring adult businesses to close from 10:00 a.m. until noon. This is a clever argument, but it confuses the requirement that a regulation serve a substantial government interest with the requirement that it be narrowly tailored to that end. We look at the provision *as a whole* to decide whether it serves a substantial government interest. Since it does, we ask whether it is narrowly tailored." *Id.*, emphasis in the original.

The court explained the practical reason for its holding thusly:

> "If we were to side with the plaintiffs here, the next litigants would argue whether evidence of secondary effects at 6:15 in the morning justifies requiring adult businesses to close at 9:30, or whether evidence from 9:30 justifies requiring them to close at 10:45. That sort of line-drawing is inconsistent with a narrow tailoring requirement that only prohibits regulations that 'are substantially broader than necessary.' (Citations.)" *Id.*

In this case, the Ninth Circuit decision adopted the approach rejected by the Eleventh Circuit and parsed the Los Angeles regulations into discrete parts, requiring the City to show that a substantial government interest supports each part. Under the Eleventh Circuit test, the court is required to determine whether the City's zoning regulation as a whole serves a substantial government interest. Under that test, the City's zoning ordinance regulating sexually explicit adult businesses is indisputably valid.

The issues in these four cases differ slightly from the one here[6]. However, what is important from the standpoint of constitutional doctrine is not the precise issue but the contrast of the Ninth Circuit's analysis with that of the other circuits. The analytical approaches of the other circuits are consistent with each other. Under their approach the city need only show that "categories" or "classes" of businesses cause the identified negative problems. Unlike its sister circuits, the Ninth Circuit did not evaluate the City's zoning regulations as a whole. The City is entitled under this Court's decisions to place sexually explicit entertainment establishments in different categories from other entertainment businesses so long as there is evidence that, as a group, they cause adverse impacts on surrounding neighborhoods.

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[6] In the view of the Ninth Circuit, the fatal defect in the City's regulation was that the 1977 Study neither analyzed the impacts of any two businesses at one location as a concentration, nor the impact of individual sexually explicit businesses on the negative secondary effects. App. 12.

The Court of Appeals created a conflict with a fifth circuit when it dismissed the City's reliance on *Hart, supra*. App. 20. *Hart* "examined a state law almost identical to the Los Angeles Ordinance" (App. 19), and held "constitutional a North Carolina statute prohibiting two or more 'adult establishments' from occupying a single building." App. 19-20. The Fourth Circuit concluded that its decision was controlled by this Court's decision in *Young* (*Hart, supra*, 612 F.2d at 824) and, after carefully comparing the operative features of the Detroit ordinance at issue in *Young* with the North Carolina statute, held that "the North Carolina statute to be merely a regulation of the place and manner of expression, without proscription of that expression. . . . " *Id.* at 826. The court explained that:

> "The North Carolina statute, like the Detroit Ordinance, is aimed at prohibiting a 'supermarket' marketing technique that offers for sale or exhibition at one business location a variety of sexual wares in addition to printed materials. Comparable regulation of specific techniques and methods of commerce in erotic material has not been thought violative of First Amendment values." *Id.* at 826.

Hart stands for the unambiguous proposition that it is permissible under the First Amendment to separate adult bookstores and adult arcades. The Ninth Circuit decision to the contrary creates a clear conflict among the circuits which this Court should resolve.

Moreover, the Ninth Circuit's dismissal of *Hart* because it was decided before *Renton* does not support the court's analysis. Whether *Hart* was decided before or

after *Renton* is irrelevant. The question is whether *Hart* is consistent with *Renton*, and the Ninth Circuit did not address that question. That *Hart's* rationale and result are fully consistent with *Renton* cannot reasonably be challenged because, as in *Hart*, "the resolution of [*Renton* was] largely dictated by our decision in *Young*. . . . " *Renton, supra*, 475 U.S. at 46.

In language foreshadowing this Court's *Renton* decision, the *Hart* court concluded that the North Carolina "regulation furthers an important or substantial interest" (*id.* at 828), explaining that:

> "North Carolina certainly has a substantial interest in maintaining a stable, healthful environment in its cities. The legislature could reasonably have determined that the development of the 'total, under one roof' approach to the marketing of sexually explicit materials and devices tended to produce secondary effects destructive of the general quality of life in the neighborhood. . . . A legislative determination that the dispersal of the marketing activities might ameliorate the secondary effects to some extent, thereby furthering the state's interest, cannot be thought unreasonable. (Citation and footnote 10 omitted)." *Id.* at 828-829.

The first sentence in footnote 10 from the above quotation states that "[o]ther decisions have found similar location restrictions for adult establishments justified as zoning to serve the legitimate interests in preserving residential neighborhoods and preventing urban decay." *Id.* at 829 n. 10. The footnote cites to, and quotes from, the City's 1997 Study as support for that proposition. Viewed in context, one readily sees that *Hart* anticipates *Renton*

and stands for the unremarkable proposition that a zoning regulation prohibiting more than one adult business at a location is a reasonable and permissible tool to regulate the dispersal of adult businesses approved in *Young*. Where, as here, the regulation is justified without reference to the content of the regulated speech and directed at the secondary effects of sexually explicit businesses in the surrounding community, it is not aimed at the suppression of speech and is a content neutral time, place and manner regulation under *Renton*. *Boos v. Barry*, 485 U.S. 312, 319-321 (1988).

With respect to the decision of which zoning tool to use, this Court has required the lower courts to defer to the legislative determination, leaving open the issue of whether the tool used "allows for reasonable alternative avenues of communication." *Renton, supra*, 475 U.S. at 50. The City's regulation is fully consistent with the City's legislative determination that the better regulatory approach in Los Angeles to address the serious problems it faced was to disperse all adult entertainment businesses without exception using the Detroit model.

As demonstrated above, there is a significant conflict between the circuits on the proper application of *Renton*. This significant conflict can only be resolved by this petition for writ of certiorari.

B. The Decision Of The Court Of Appeals Directly Conflicts With This Court's Decision in *Renton*.

The opinion of the Court of Appeals effectively turns back the calendar in the Ninth Circuit on the law governing locational zoning regulations for adult entertainment

businesses to February 24, 1986, the day before this Court filed its decision in *Renton* which reversed the Ninth Circuit's decision in *Playtime Theatres, supra*. The similarity in reasoning between the Court of Appeals' 1984 decision and the one here is remarkable. The result is, of course, identical: an otherwise content neutral time, place and manner zoning regulation on the location of sexually explicit adult businesses is held unconstitutional for an imagined failure of proof by the municipality to justify the regulation. In *Renton*, this Court disapproved the rationale which led to that result, stating that "the Court of Appeals imposed on the City an unnecessarily rigid burden of proof." *Renton, supra*, 475 U.S. at 50. Here, the burden of proof imposed on cities by the Ninth Circuit goes beyond being merely "rigid" to virtually impossible.

The Ninth Circuit in 1984 held that the City of Renton failed to show that it had a substantial government interest in regulating zoning of adult theaters because the City of Renton had neither studied the secondary effects of adult theaters, nor applied any such findings to the particular problems or needs of Renton. *Playtime Theatres, supra*, 748 F.2d at 537. Because Renton had relied upon the experiences and studies of other cities, the Ninth Circuit held that the city's findings were conclusionary and speculative as applied to Renton since the documented problems of other cities concerning adult uses were "simply not relevant" to Renton. *Id.*

This Court specifically rejected the Ninth Circuit's reasoning as "unnecessarily rigid" because the Renton ordinance "was aimed at preventing the secondary effects of even *one* such [adult] theater in a given neighborhood." *Renton, supra*, 475 U.S. at 50, emphasis added. This

Court held that Renton could rely upon the detailed findings of the City of Seattle in enacting its ordinance:

> "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses. That was the case here. *Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question* either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton." *Id.*, at 51-52, emphasis added.

This Court then went on to state:

> "We also find no constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. 'It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems. (Citation omitted.) Moreover, the Renton ordinance is "narrowly tailored to affect only that *category* of theaters shown to produce the unwanted secondary effects. . . . " *Id.* at 52, emphasis added.

Renton set forth a three-step, four-factor analytical framework for analyzing the constitutionality of a zoning

ordinance regulating adult entertainment businesses. The Los Angeles ordinance under review here meets this Court's test.

The first step asks: Is the ordinance a "time, place, and manner regulation?" *Id.* at 46. An ordinance meets this test if "it does not ban adult [businesses] altogether." *Id.* The Los Angeles zoning regulation does not ban adult businesses and meets this part of the *Renton* test.

The second analytical step is whether the challenged zoning regulation is "content neutral." *Id.* at 47. "[W]ith respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." *Id.* at 49. The Los Angeles zoning regulation challenged here is solely designed to address the proven significant secondary effects associated with the concentration of sexually explicit adult businesses within the City. It meets the second step of the *Renton* test.

The third *Renton* step is two-fold, whether the "ordinance is designed to serve a substantial governmental interest *and* allows for reasonable alternative avenues of communication." *Id.* at 50, emphasis added. A municipality's concern about the quality of life and the need to mitigate the negative secondary effects associated with adult entertainment businesses are important and substantial governmental interests. *Id.* at 50; *Young, supra,* 427

U.S. at 71-73. Clearly, this City's prophylactic zoning regulation serves a substantial government interest[7].

The Court of Appeals' decision in this case renders meaningless *Renton's* straightforward analytical framework in favor of a new standard purportedly based on Ninth Circuit precedent. App. 6-9. The Court of Appeals dismissed as "needlessly establishe(d)" *Renton's* first step, whether the ordinance is a time, place or manner regulation. App. 9. However, the court is then quick to concede that the City's ordinance meets the test[8]. App. 10.

With respect to the second *Renton* step, the Court of Appeals held that the City was unable to establish a substantial governmental interest in prohibiting the concentration of adult entertainment businesses within one building because the City's 1977 Study was "insufficient" to justify that specific regulatory detail. App. 11. Even though the 1977 Study has been found sufficient to support numerous regulations in other jurisdictions which relied on it (See, e.g., footnote 1, *supra*), the Ninth Circuit found that it was insufficient to support the authoring

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[7] Whether the City's ordinance allows for "reasonable alternative avenues of communication" is not before the Court. This issue was rendered moot when the trial court granted plaintiffs' motion for summary judgment. App. 54.

[8] Cf., *Lim v. City of Long Beach*, 217 F.3d 1050, 1053 (9th Cir. 2000), where the same panel in a case argued and submitted on the same day as this one did not feel compelled to deconstruct this Court's straightforward *Renton* analysis in order to reinterpret it: "Where an ordinance does not ban adult businesses outright, but limits the areas of a city in which they may operate, it is considered a content-neutral time, place, and manner restriction."

City's regulation because it "was not directed at determining the impact of individual adult business units." (10743.) The court therefore found it unreasonable for the City to infer that the combination of sexually explicit businesses at one location " 'would produce harmful secondary effects of the type asserted' in the 1977 Study." App. 12.

The Ninth Circuit's approach directly conflicts with *Renton*. The Court of Appeals, as it did before, has invalidated a zoning regulation because the City's "ordinance was enacted without the benefit of studies specifically relating to 'the particular problems or needs of [Los Angeles],' the city's justifications for the ordinance were 'conclusionary and speculative.' 748 F.2d at 537." *Renton, supra*, 574 U.S. at 50. The Ninth Circuit now requires the City to establish not only that there are adverse secondary effects resulting from the concentration of adult entertainment businesses; it also requires the City to *prove* that placing two or more adult businesses in a single building *specifically* contributes to the identified negative secondary effects. In practice, and in reason, this approach effectively precludes all adult business zoning regulations in the Ninth Circuit, rendering *Renton* meaningless. Each individual business can avoid regulation by simply asserting that "it is not I" who is contributing to the problem.

Moreover, the Ninth Circuit's approach is illogical as it applies here. Although not readily conceded by the Court of Appeals, the 1977 Study did establish that the concentration of adult businesses produced serious secondary effects within the communities they are located,

justifying their separation from each other and from traditionally protected sensitive land uses. App. 11. Notwithstanding this evidence, the Ninth Circuit has decided that the 1977 Study is insufficient to justify a regulation which would prevent two – or even all – adult entertainment businesses in Hollywood from locating within one building. The court's approach reimposes in the Ninth Circuit the overly rigid burden of proof rejected by this Court and is contrary to the "reasonable opportunity to experiment with solutions" standard established in *Renton*.

Had the Court of Appeals below undertaken a proper *Renton* analysis, as did the court in *Mitchell*[9], for example, it should have readily decided that the City's 1977 Study provided a substantial evidentiary record from which to conclude that adult entertainment businesses *as a class* caused very serious negative secondary effects. Applying that standard, the court also should have decided that the City's regulation could be constitutionally applied to multiple adult businesses in one building to remedy those problems.

This significant conflict with this Court's *Renton* decision can only be resolved by this petition for writ of certiorari.

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[9] Discussed at pages 14-15, *supra*.

CONCLUSION

As demonstrated above, there is a direct conflict among the circuits concerning the evidentiary burden of proof necessary to justify a zoning ordinance regulating adult businesses under *Renton*. The issue is important and the conflict goes to the very essence of this Court's jurisprudence permitting municipalities to effectively regulate the adverse secondary impacts of sexually explicit businesses through zoning. Further consideration by this Court is required to resolve this significant conflict among the circuits by means of this petition for writ of certiorari.

DATED: November 16, 2000

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAMEDA BOOKS, INC., a California corporation; HIGHLAND BOOKS, INC., a California corporation, *Plaintiffs-Appellees,* v. CITY OF LOS ANGELES, *Defendant-Appellant.*	No. 98-56200 D.C. No. CV-95-07771-DDP (CTx) ORDER AMENDING OPINION AND DENYING REHEARING AND AMENDED OPINION

Appeal from the United States District Court for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Argued and Submitted
February 8, 2000 – Pasadena, California

Filed July 27, 2000
Amended August 28, 2000

Before: Robert Boochever, Michael Daly Hawkins, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Hawkins

COUNSEL

Michael L. Klekner, The City of Los Angeles, Los Angeles, California, for the defendant-appellant.

G. Randall Garrou, Weston, Garrou & DeWitt, Los Angeles, California, for the plaintiffs-appellees.

Robert W. Hargreaves, Best Best & Krieger, Rancho Mirage, California, for amicus curiae Sixty-Five (65) California Cities, in support of the appellant.

G. Randall Garrou, Weston, Garrou & DeWitt, Los Angeles, California, for amicus curiae Center for Fair Public Policy in support of the appellees.

Richard J. Hertzberg, Phoenix, Arizona, for amicus curiae L.J. Concepts, Inc., in support of the appellees.

ORDER

The Opinion filed on July 27, 2000, slip op. 8935, and appearing at 2000 WL 1047892 (9th Cir. July 27, 2000), is amended as follows:

At Slip op. 8939, in the first line below "BACKGROUND" – substitute "On July 28, 1978" for "On July 28, 1977"

At slip op. 8953, in the last sentence of the penultimate paragraph – substitute "Therefore, any inference that the statute could have an ameliorating impact on the identified harmful secondary effects would be unreasonable under both *Tollis* and *Acorn*." for "Therefore, any inference that, absent the statute, the harmful affects [sic] would be ameliorated would be unreasonable under both *Tollis* and *Acorn*."

With these amendments, the panel has voted to deny Plaintiffs-Appellees' petition for rehearing. Petition DENIED.

OPINION

HAWKINS, Circuit Judge:

We must determine whether the district court was correct in concluding as a matter of law that ordinances of the City of Los Angeles (the "City" or "Los Angeles") prohibiting the operation of adult businesses that both sell adult products and contain facilities for the viewing of adult movies or videos were inadequately supported by evidence of adverse impact so as to violate the First Amendment. We affirm.

I.

BACKGROUND

On July 28, 1978, the City enacted Ordinance No. 151,294, adding section 12.70 to the Los Angeles Municipal Code ("L.A.M.C."), which prohibits the "establishment, substantial enlargement or transfer of ownership or control" of an adult business establishment "within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park within the City of Los Angeles." L.A.M.C. § 12.70(C) (1977). The regulation was enacted after a comprehensive study, conducted in 1977 and assessing the impact of concentrations of adult businesses on surrounding areas, found a positive correlation between concentrations of adult businesses and increases in prostitution, robberies, assaults, and thefts.[1]

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[1] The Study also stated there was "some basis to conclude" that property values in the study areas increased to a lesser degree than in the control areas. It concluded, however, that the

In 1983, the City amended section 12.70(C), with the passage of Ordinance No. 157,538 to prohibit so-called "multiple use" adult businesses. Section 12.70(C), as amended, additionally prohibits "the establishment or maintenance of more than one adult entertainment establishment in the same building, structure, or portion thereof. . . . " L.A.M.C. § 12.70(C). The 1983 amendments also modified the existing definition of an "adult entertainment business" to specifically categorize *inter alia* an "adult bookstore" and an "adult arcade" as "separate adult entertainment businesses even if operated in conjunction with another adult entertainment business at the same establishment." L.A.M.C. § 12.70(B)(17).

Appellees, Alameda Books, Inc. ("Alameda") and Highland Books, Inc. ("Highland"), are two adult businesses operating within the city limits of Los Angeles. Neither is located within 1,000 feet of another adult business nor within 500 feet of any religious institution, public park, or school. Each business occupies less than 3,000 square feet. Both Alameda and Highland rent and sell sexually oriented products, including videotapes. Additionally, both businesses provide booths where patrons can view videotapes for a fee. The booths are of two types. In the Preview Booths customers can view videotapes that are for rent or sale within the store. The Multichannel Viewing Booths allow customers to choose from dozens of pre-selected videotape selections.

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concentration of adult businesses was not the primary cause of this phenomenon.

The video booths and the retail sales and rental of tapes of both stores are located in the same commercial space within a single building. There are no distinctions, physical or otherwise, between the different operations within each of the stores. Each has only one entrance door, and one employee supervises the entire location. Additionally, the appellees are the sole owners of each of their stores, and revenue from the video booths and the sales and rentals is not distinguished in any way, other than for internal accounting purposes. Notwithstanding these facts, it is uncontested that both businesses have operations that fall within the definitions of "adult bookstore" and "adult arcade" under section 12.70(B)(17) of the L.A.M.C.

On March 15, 1995, a City building inspector found that Alameda was operating both an adult bookstore and an adult arcade in the same building and was therefore in violation of section 12.70(C). Alameda and Highland then joined as plaintiffs and sued for declaratory and injunctive relief under 42 U.S.C. § 1983 to prevent enforcement of the ordinance. Both the City and the appellees filed cross-motions for summary judgment.

The district court initially denied both motions on the First Amendment issues, concluding that there was a "genuine issue of fact as to whether plaintiffs' bookstore and arcade components were separate businesses, like those whose concentration was examined by the 1977 studies." Alameda and Highland then filed a motion for reconsideration of the First Amendment portion of the district court's order denying summary judgment. On June 2, 1998, the court vacated its prior order and granted summary judgment for Alameda and Highland and

issued a permanent injunction enjoining the enforcement of the ordinance against the appellees. The City then appealed to this court. We have jurisdiction under 28 U.S.C. § 1291.

II.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *See, e.g., Robi v. Reed*, 173 F.3d 736, 739 (9th Cir.), *cert. denied*, 120 S. Ct. 375 (1999). We must determine, viewing the evidence in the light most favorable to the appellants, whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *See, e.g., Berry v. Valence Tech., Inc.*, 175 F.3d 699, 703 (9th Cir.), *cert. denied*, 120 S. Ct. 528 (1999). We do not weigh the evidence or determine the truth of the matter; rather, we only decide whether there is a genuine issue of material fact for trial. *See Colacurcio v. City of Kent*, 163 F.3d 545, 549 (9th Cir. 1998).

The constitutionality of a regulation is a question of law that is reviewed de novo. *See Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1553 (2000).

III.

ANALYSIS

A. *Renton* Analysis

Our inquiry, though not the result, is somewhat complicated by two varying formulations of the test governing our analysis. In *Tollis v. San Bernardino County*, 827

F.2d 1329 (9th Cir. 1987), we were presented with the opportunity to apply the then-recent decision of the Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), which analyzed the constitutionality of city zoning regulations that prohibited adult theaters from being located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. *Tollis* held that *Renton* had established a "three-step inquiry" to determine the constitutionality of such ordinances. *Tollis*, 827 F.2d at 1332. A reviewing court must inquire: (1) whether the ordinance is a time, place, manner regulation; (2) if so, whether it is content-neutral or content-based; and (3) if content-neutral, whether it is "designed to serve a substantial governmental interest and do[es] not unreasonably limit alternative avenues of communication." *Id.* (internal quotations omitted); *see also Renton*, 475 U.S. at 47.

More recently, we formulated this test in a slightly different and (we believe) more coherent manner. In *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1999), we looked to the Supreme Court's opinion in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), to determine the constitutionality of the city's ordinance requiring nude dancers to perform at least ten feet from patrons.[2] Citing

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[2] *Colacurcio* involved expressive conduct, which is not at issue here. The Supreme Court, however, has noted that the test for regulations affecting expressive conduct is nearly identical to the test for time, place, or manner regulations affecting protected speech. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) ("[V]alidating a regulation of expressive conduct . . . in the last analysis is little, if any, different from the standard applied to time, place or manner

to *Ward*, we held that "[m]unicipalities may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are: (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information." *Colacurcio*, 163 F.3d at 551.

The differences between the *Tollis* and *Colacurcio* test are slight, yet obvious. *Colacurcio* eliminates *Tollis*'s first step – determining whether the ordinance is a time, place or manner regulation – and merely splits the two inquiries of *Tollis*'s third step – narrow tailoring to serve a significant government interest and ample alternative means of communication – into two separate steps.[3]

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restrictions."). Consequently, in *Colacurcio* we looked to *Ward*, a case involving restrictions impacting on speech per se (and not expressive conduct), for guidance. *See also Colacurcio*, 163 F.3d at 551, n. 4 (quoting *Clark* and noting that the Ninth Circuit frequently cites both the test for expressive conduct and that for time, place or manner regulations when analyzing regulations of adult entertainment).

[3] We note that in *Colacurcio* we held that the regulation must serve a "significant" government interest, *see* 163 F.3d at 551, while in *Tollis* we held that the government interest must be "substantial." 827 F.2d at 1332. We accord no substantive difference to these terms as they are used in the adult zoning context. Indeed, the language in *Tollis* was taken from our decision in *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1334-35 (9th Cir. 1986), which was cited with approval in *Colacurcio*. *See* 163 F.3d at 551 n. 4. Additionally, *Tollis* did not explicitly include the narrow tailoring requirement as part of its third step. That *Tollis* requires the regulation must be "narrowly tailored" to serve a substantial government interest is, however, clear from the opinion. *See Tollis*, 827 F.2d at 1333 (holding that

Clearly, there is no substantive difference between *Tollis* and *Colacurcio*, and a given result under one necessarily dictates an identical outcome under the other. Moreover, the jurisprudence governing each test is fully applicable to both.

Colacurcio, however, better formulates the test. First, the third step of *Tollis* incorporates two distinct inquiries, which are more properly separated for both conceptual and practical reasons in *Colacurcio*. Additionally, *Tollis* needlessly establishes the time, place or manner inquiry as a distinct step. Time, place or manner is an objective description of a regulation (or one proffered by the enacting legislative body); it is not a talismanic incantation affording the ordinance a lesser degree of judicial scrutiny. To the contrary, the question the courts must ask is whether the time, place or manner regulation is content-neutral. The Supreme Court recognized as much in *Ward* when it excluded a time, place or manner analysis, which it had included in *Renton*, from its discussion. For the sake of clarity and consistency in future opinions, and because we believe the *Colacurcio* formulation is more aptly constructed, we will utilize it here.

As a preliminary matter, we note that section 12.70(C) comes under the general category of a time, place, or manner regulation. *Renton* held that zoning regulations governing adult businesses are generally considered time, place or manner regulations. *See Renton*, 475

"[t]he County has thus failed to show that the ordinance, as interpreted by the County . . . is sufficiently 'narrowly tailored' to affect only that category of theatres shown to produce the unwanted secondary effects") (*quoting Renton*, 475 U.S. at 51).

U.S. at 46. Moreover, section 12.70(C) does not ban adult entertainment establishments altogether. *See Tollis*, 827 F.2d at 1332 (holding that ordinance before the court was "obviously" a time, place, or manner regulation "as it [did] not ban adult theaters altogether").

Under *Colacurcio*'s first step (i.e. *Tollis*'s second step), a regulation is content-neutral if the ordinance is "aimed to control secondary effects resulting from the protected expression rather than at inhibiting the protected expression itself." *Tollis*, 827 F.2d at 1332 (internal quotation omitted) (citing *Renton*, 475 U.S. at 48-49); *see also Renton*, 475 U.S. at 48 (regulation is content-neutral if it is "justified without reference to the content of the regulated speech").[4] We need not decide whether the contested regulation is content-neutral, for even if it were, it fails to satisfy the second step in the *Colacurcio* analysis (i.e. the third step of *Tollis*).[5]

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[4] As discussed above, because the *Tollis* and *Colacurcio* tests are identical, the standards applied to one may be applied to another.

[5] The district court conducted its analysis using a slightly different approach that, though perfectly reasonable, somewhat conflated the inquiries under *Tollis*'s second and third steps. We need not specifically endorse this analysis, as section 12.70(C) fails to satisfy the second step of *Colacurcio* (i.e. the third step of *Tollis*.) *See Cline v. The Indus. Maintenance Eng'g and Contract Co.*, 200 F.3d 1223, 1229 (9th Cir. 2000) ("Summary judgment may be affirmed on any ground supported in the record, including reasons not relied upon by the district court.").

B. *Colacurcio*'s Second Step: Substantial Government Interest

The City has a "substantial government interest" in reducing crime in its neighborhoods. *See Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976) ("[T]he city's interest in attempting to preserve the quality of urban life in [sic] one that must be accorded high respect."). At issue is whether the regulations are "designed to serve" this interest. We hold they are not.

The only evidence relied upon by Los Angeles to justify the 1983 amendments to section 12.70(C) is the 1977 study (the "Study"), which was used as the basis for the enactment of the original regulations. This is insufficient.

The Study looked at the concentration of four types of adult businesses: massage parlors, "bookstores/arcades," theaters, and adult motels. It assessed five areas where these businesses were concentrated and compared crime rates in these areas with rates in nearby "control" areas. Additionally, the Study measured changes in assessed land values from 1970 to 1976 in the study and control areas. As noted, the Study concluded that there was a positive correlation between concentrations of these adult businesses and increases in prostitution, robberies, assaults, and thefts.

The district court found that the Study addressed the secondary impact not of single adult business establishments, but of concentrations of separate, individual adult businesses, and that appellees' businesses are not separate in the sense that the businesses surveyed in the Study were separate establishments. As the Study was

the only evidence to justify the 1983 amendments, the district court held that summary judgment was appropriate because the City could not meet its burden to show that it "relied on evidence supporting a reasonable belief that combination businesses . . . produced harmful secondary effects of the type asserted" in the 1977 Study. We agree.[6]

The Study treated a bookstore/arcade combination as a single business or unit of adult entertainment whose secondary effects arise from its proximity to several other units of adult entertainment. It did not analyze an individual bookstore/arcade combination as a concentration of adult businesses.

Additionally, the Study was not directed at determining the impact of individual adult entertainment business units. Rather, its purpose was to ascertain the impact of a concentration of such business units in small geographic areas. Therefore, by categorizing certain businesses as "bookstore/arcades," the Study determined not what the impact of a "bookstore/arcade" was on the surrounding

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[6] It is well-established that the burden of proof is on the City to justify a regulation which burdens the freedom of expression. *See, e.g., Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 n. 5 (1984) ("[I]t is common to place the burden upon the Government to justify impingements on First Amendment interests"); *Lim v. City of Long Beach*, 2000 WL 821295 at *2 (9th Cir. Jun. 27, 2000) (noting that it is "clear" that the burden of proving alternative avenues of communication rests on the government); *Tollis*, 827 F.2d at 1333 ("The County *must show* that in the enacting particular limitations . . . it relied upon evidence permitting the reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects." (emphasis added)).

area, but the impact of a bookstore/arcade as an individual business entity that was part of a concentration consisting of multiple adult business establishments. As such, the Study did not identify any harmful secondary effects resulting from bookstore/arcade combinations as individual business units.

The City does not argue that the Study explicitly considered adult arcades and bookstores as separate business entities, an argument that would support its contention that a combination bookstore/arcade as an individual business entity is a "concentration" of adult businesses. Nor does it dispute that the concentration of adult businesses was the primary cause of the harmful secondary effects identified in the Study. Indeed, the pertinent findings of the Study focus solely on the concentration of separate adult business entities. Rather, the City asserts that the Study provides enough of a basis to allow it to constitutionally proscribe combination adult businesses under section 12.70(C) of L.A.M.C. The City's arguments fail.

In examining the City's regulation of adult businesses, we are mindful of numerous admonitions from the Supreme Court about the proper role of the judiciary in scrutinizing legislative judgments. In *American Mini Theatres*, the Supreme Court recognized that the courts are not to second-guess legislative solutions. In upholding the validity of a zoning regulation prohibiting adult entertainment establishments within 1,000 feet of one another, the Court stated: "It is not our function to appraise the wisdom of [the City Council's] decision. . . . Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious

problems." 427 U.S. at 71; *see also Renton*, 475 U.S. at 52 (quoting *American Mini Theatres*); *United States v. Albertini*, 472 U.S. 675, 689 (1985) (validity of a content-neutral time, place, or manner regulation does not "turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests"); *Jones Intercable, Inc. v. City of Chula Vista*, 80 F.3d 320, 326 (9th Cir. 1996) (courts "accord substantial deference to the predictive judgments" of legislative bodies when analyzing content-neutral regulations that burden speech) (quoting *Turner Broad. Sys., Inc. v. FCC ("Turner I")*, 512 U.S. 622, 665 (1994)).

This deference to legislative decision making is not unbounded. In *Tollis*, we established a predicate evidentiary requirement that must be met before we will defer to the judgments of legislative bodies enacting content-neutral time, place, or manner regulations that incidentally burden speech. *Tollis* considered an injunction against the enforcement of a county zoning ordinance prohibiting adult-oriented businesses from locating within 1,000 feet of various other establishments (e.g., schools, churches, etc.). The county had interpreted the ordinance such that a single showing of an adult movie would make a theater an "adult-oriented business" for the purposes of the ordinance. *See* 827 F.2d at 1331.

In affirming the injunction, we held that under *Renton*, the county "must show that in enacting the particular limitations . . . *it relied* upon evidence permitting a reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects." *Id.* at 1333 (emphasis added). We then found that the county

had presented no evidence that a single showing of an adult film would have any of the harmful secondary effects on the community that the county had identified as the basis for the regulation. *Id.*

Like the county in *Tollis*, Los Angeles has presented no evidence that a combination adult bookstore/arcade produces any of the harmful secondary effects identified in the Study. As the above discussion indicates, the evidence the City has "relied" upon – the 1977 Study – contains no findings that an individual combination bookstore/arcade produces any of the increased crime the Study found resulting from a concentration of adult businesses. Therefore, it is unreasonable for the City to infer that absent its regulations, a bookstore/arcade combination would have harmful secondary effects. *See also Acorn Invs., Inc. v. City of Seattle*, 887 F.2d 219, 222 (9th Cir. 1989) (holding unconstitutional under *Renton* a city licensing fee for specific types of adult theaters because the City had "failed to prove" that these theaters were responsible for fostering the alleged secondary effects – criminal activity – that were given as justification for the licensing fee); *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 211 (1997) (holding that in reviewing content-neutral regulations burdening speech under an intermediate scrutiny standard, the question for the courts "is whether the legislative conclusion was reasonable and supported by *substantial evidence in the record before [the legislative body]*") (emphasis added).

The City argues that the original intent of section 12.70(C), adopted pursuant to the Study, included a ban on more than one adult business in a building. This argument is unpersuasive. Whether the prohibition

against combination businesses was intended to be included in the original ordinance is largely immaterial to the question of whether the Study adequately justifies the current regulations.

Nor could Los Angeles have reasonably concluded that the expansion of an adult bookstore to include an adult arcade would increase the frequency and regularity of activity for the business and heighten the probability that such activity would produce the harmful secondary effects identified in the Study. Such reasoning would justify the prohibition of the simple expansion of a lone adult bookstore in order to accommodate a larger variety of adult products (which, ostensibly, would attract more patrons), and not for the purpose of installing an arcade. Such a prohibition, however, is clearly not supported by the Study.

The Supreme Court, as well as this circuit, have held that a legislative body may rely on studies, conducted by other cities and counties, linking a concentration of adult businesses to increased crime to justify its own regulation of adult businesses. In *Renton*, the Court held that the city

> was entitled to rely on the experiences of . . . other cities . . . in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

475 U.S. at 51-52; *see also Colacurcio*, 163 F.3d at 551 ("In evaluating the secondary effects of adult entertainment,

the city is also permitted to rely on experiences of other jurisdictions.").

Los Angeles relies on this ability to use foreign studies for the proposition that the 1983 amendments to section 12.70(C) are entitled to similar deference. If foreign studies can be used to justify the regulation of adult business, then surely, the City argues, its regulations, based upon its own study, are entitled to deference. Again, this argument misses the mark. That a legislative body may rely on foreign studies to establish its interest in a regulation does not relieve that entity from the obligation of demonstrating that the study must be " 'reasonably believed to be relevant to the problem that the city addresses.' " *Colacurcio*, 163 F.3d at 551 (quoting *Renton*, 475 U.S. at 51-52). As shown, the Study fails this test.[7]

The City also points to decisions of our sister circuits in support of its argument that the Study provides the necessary evidentiary basis to satisfy *Renton*'s third

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[7] In this regard, the Supreme Court's recent opinion in *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000), is of little aid to Los Angeles. In upholding the City of Erie's ban on nude dancing, the Court stated that "Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres*" with respect to the secondary effects of adult entertainment establishments because the nude dancing that claimed protection was "of the same character as the adult entertainment at issue" in the two cases. *Id.* at 1395. For the purposes of the secondary effects identified in the Los Angeles Study, a solitary bookstore/arcade combination is hardly of the "same character" as a grouping of multiple adult business establishments in a given geographical area.

prong. The cases cited, however, are either directly contrary to established Ninth Circuit precedent, or merely restate the requirement that a legislative body's reliance upon the evidence it cites must be reasonable. *See, e.g., Renton*, 475 U.S. at 51-52.

In *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994), the Eighth Circuit upheld the constitutionality of an adult business zoning ordinance, as applied to adult bookstores, that prohibited on-premises viewing of adult movies or videotapes. The court noted that Rochester relied on foreign studies and held that under *Renton*,

> Rochester need not prove that [plaintiffs' business] would likely have the exact same adverse effects on its surroundings as the adult businesses studied by [other cities]. So long as Ordinance No. 2590 affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects, Rochester must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Id. at 1418 (internal quotation omitted). While this application of *Renton* may be somewhat more flexible than the standard we announced in *Tollis*, Los Angeles's regulations would still fail under the Eighth Circuit's analysis. The Los Angeles Study examined concentrations of multiple adult business establishments; it did not study the impact of individual establishments in any form, whether as solitary units or as part of the concentration of businesses. Under the Eighth Circuit's analysis, then, Los Angeles could not have reasonably believed, based on the

Study, that an individual adult business could produce some of the secondary effects resulting from a concentration of businesses.

In *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3rd Cir. 1993), the Third Circuit upheld a Delaware statute setting closing hours for adult businesses and prohibiting closed viewing booths. The court cited to *Renton* and held that the state "need only show that adult entertainment establishments as a class cause the unwanted secondary effects the statute regulates." *Id.* at 138. This statement and the Third Circuit's citation to *Renton* pertain to whether the regulation is narrowly tailored, not whether the evidence produced can reasonably justify the regulation as serving a substantial government interest. Narrow tailoring of the Los Angeles ordinance is a question we need not address.

Moreover, if the Third Circuit's holding were applied to the issue before us, we would have to reject its analysis. Merely requiring that a legislative body show that adult establishments as a class cause the secondary effects the regulation is aimed at preventing could easily fall far short of our requirement in *Tollis* that a legislative body "must show that in enacting the particular limitations . . . it *relied upon* evidence permitting the reasonable inference that, absent such limitations, the adult [businesses] would have harmful secondary effects." 827 F.2d at 1333 (emphasis added).

Finally, the City cites *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), a case in which the Fourth Circuit examined a state law almost identical to the Los Angeles ordinance. *Hart* held constitutional a

North Carolina statute prohibiting two or more "adult establishments" from occupying a single building. Adult bookstores and adult arcades were defined as separate establishments under the statute.

The Fourth Circuit found that the statute, "on its face," was a "permissible regulation of the external costs of adult establishments that is unrelated to the overall suppression of any protected materials offered by them for public consumption." *Id.* at 829. In concluding that the statute served a substantial government interest, the court noted that no formal legislative history existed for the statute, but held that a legislative determination that the dispersal of the marketing activities of the businesses might ameliorate adverse secondary effects "cannot be thought unreasonable." *Id.* at 828.

Hart was decided before *Renton*; therefore, there may be some doubt that it would survive scrutiny under the current Supreme Court's precedent. We are sure, however, that the case would not pass muster under our decisions in *Tollis* and *Acorn*. In *Hart*, there was no evidence from foreign studies to support the statute. What evidence the court did cite as being produced by the state – a report on health conditions inside the video viewing booths that the bill's sponsor read to a legislative committee, *see id.* at 828 n.9 – would not meet *Tollis*'s reasonable inference requirement.

Prohibiting arcades and adult bookstores from being located in the same building would not prevent the type of unhealthy conditions in the booths that the Fourth Circuit cited as the only evidence produced by North Carolina to justify its statute. There is nothing in the case

to indicate that the same type of behavior that occurs in viewing booths in combination bookstore/arcades would not occur in an establishment that only furnishes an arcade. Therefore, any inference that the statute could have an ameliorating impact on the identified harmful secondary effects would be unreasonable under both *Tollis* and *Acorn*.

The decision of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., et al., Plaintiffs, v. CITY OF LOS ANGELES, Defendant.	Case No. CV 95-7771 DDP (CTx) ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION OF FIRST AMENDMENT PORTION OF SUMMARY JUDGMENT ORDER ENTERED JANUARY 12, 1998 DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF EQUAL PROTECTION PORTION OF SUMMARY JUDGMENT ORDER GRANTING PLAINTIFFS' MOTION TO ALTER OR AMEND VAGUENESS PORTION OF SUMMARY JUDGMENT ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed May 28, 1998)

This matter comes before the Court on the plaintiffs' motions to reconsider the First Amendment and Equal

Protection portions of the Court's January 12, 1998 Order granting in part the defendant's summary judgment motion, and denying the plaintiffs' summary judgment motion ("Summary Judgment Order"). The Court heard oral argument on April 13, 1998. Having considered the parties' contentions in light of the applicable legal authorities, the Court grants the plaintiffs' motion for reconsideration of the First Amendment portion of the Summary Judgment Order, denies the plaintiffs' motion for reconsideration of the Equal Protection portion of the Summary Judgment Order, and grants the plaintiffs' motion to alter or amend the vagueness portion of the Summary Judgment Order.

I. Introduction

The issue in this case is whether the City of Los Angeles (the "City") violates the First Amendment by enforcing a zoning ordinance that defines certain activities as "adult entertainment businesses" and prohibits the operation of more than one such business in the same building. Non-obscene adult entertainment is protected by the First Amendment. Local governments may impose special zoning restrictions on adult entertainment businesses without violating the First Amendment, provided that such restrictions are directed at harmful "secondary effects" of such businesses, and not at suppressing the content of adult entertainment. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986). The plaintiffs contend that at the time of the ordinance's enactment, the City did not have a reasonable basis to believe that multiple adult entertainment uses within a single business created harmful secondary effects, and that therefore a

multiple use restriction applicable only to adult entertainment businesses violates the First Amendment. The City contends that the 1977 Studies presented to the City Council at the time of enactment demonstrated that concentrations of adult entertainment businesses have harmful secondary effects, and that these studies support a restriction on concentrations of multiple uses within one business. The Court finds that while the studies addressed concentrations of separate adult entertainment businesses in an urban area, the studies did not treat the activities conducted by the plaintiffs – video rental and on-premises video viewing – as separate businesses. The Court therefore finds that there is no genuine issue of fact whether the multiple use ordinance was justified by a showing of harmful secondary effects at the time of its enactment.

II. Background

The plaintiffs are corporations that operate adult bookstores in the City of Los Angeles. The bookstores are Alameda Books and Highland Books. The bookstores offer "non-obscene sexually-oriented" videotapes for sale and rental.[1] (Declaration of Steven D. Wiener, President of Highland Books, Inc. and Alameda Books, Inc. ("Wiener Decl.") ¶ 5.)

[1] The parties do not dispute the characterization of the material offered by the bookstores as non-obscene. The Court finds, therefore, that non-protected obscene speech is not at issue in this case.

In addition, the bookstores include a number of booths in which customers, for a small fee, can preview videotapes offered for sale or rental in the store. (*Id.* ¶ 13.) The stores also include a number of video booths which provide customers with an average of sixty different channels of videos. For a per-minute fee, customers may browse among the channels until a timer stops the machine. (*Id.* ¶ 12.)

The plaintiffs challenge the validity of a portion of the Los Angeles Municipal Code ("LAMC") that prohibits the maintenance of more than one adult entertainment business in the same building.[2] The multiple use provision, LAMC § 12.70(C), is part of an adult entertainment zoning ordinance mandating a minimum distance between adult entertainment businesses.

In 1978, the City enacted LAMC § 12.70, prohibiting adult entertainment businesses from being established, enlarged or subject to transfer of ownership within 500 feet of churches, schools, or parks, or within 1,000 feet of other adult entertainment businesses. (*See* Plaintiffs' RJN Ex. A.) In 1984, the City amended LAMC § 12.70 to prohibit the maintenance of more than one adult entertainment business in the same building or structure. LAMC § 12.70(C). (*See* Plaintiffs' RJN Ex. C.)

[2] The Court takes judicial notice of the adult entertainment zoning ordinance, Los Angeles Municipal Code ("LAMC") § 12.70. (Plaintiffs' Request for Judicial Notice ("RJN") Ex. G.) The Court also takes judicial notice of the acts of the Los Angeles City Council enacting and amending the adult entertainment zoning scheme. (Plaintiffs' RJN Exs. A-F.)

Under the ordinance, the component of the plaintiffs' businesses that rents video tapes for home use is defined as an "Adult Bookstore." LAMC § 12.70(B)(2)(a). The component of the plaintiffs' businesses in which customers may view tapes on the premises is defined as an "Adult Arcade." LAMC § 12.70(B)(1). The 1983 multiple use ordinance defines an "Adult Entertainment Business" as an

> Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theatre, Adult Theatre, Massage Parlor, or Sexual Encounter Establishment, as defined herein, and each shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment.

LAMC § 12.70(B)(17).

The City has not enforced the multiple use ordinance since its enactment in 1983. The City was preliminarily enjoined from enforcing the ordinance against several bookstores in *Topanga Press, Inc., et al v. City of Los Angeles*, CV 88-7838 RG (SHx) (C.D. Cal. 1991), *aff'd*, 989 F.2d 1524 (9th Cir. 1993). (*See* Klekner Dec. Ex. 22 attached to Def.'s Am. Opp.) After the United States Supreme Court denied certiorari, the City settled the eight cases underlying *Topanga Press*, stipulating to a permanent injunction prohibiting enforcement of the ordinance only against the *Topanga Press* plaintiffs. (1 Defendant's RJN Ex. 1.)

In 1994, the City again threatened to enforce the ordinance. The targeted adult businesses filed two lawsuits. Preliminary injunctions issued in both cases, *Diamond v. City of Los Angeles*, CV 95-1534 AWT (C.D. Cal.

June 9, 1995) and *E.W.A.P., Inc. v. City of Los Angeles*, CV 95-1711 AWT (C.D. Cal. June 9, 1995). The City settled, again stipulating to a permanent injunction as to the businesses involved in the lawsuits. (King Decl. ¶¶ 9-10.)

In November 1995, the plaintiffs' counsel heard from the counsel in *Diamond* and *E.W.A.P.* that the City was planning to prosecute Alameda Books under the ordinance. (Complaint ¶ 40.) The plaintiffs initiated this action seeking declaratory and injunctive relief under 42 U.S.C. § 1983. On December 19, 1995, this Court issued a preliminary injunction barring enforcement of the ordinance during the pendency of this action.

The plaintiffs assert three causes of action. The first cause of action alleges that the ordinance facially violates the First Amendment free speech clause and the Fourteenth Amendment equal protection clause. The second cause of action alleges that the adult entertainment zoning scheme violates the First Amendment by failing to provide for reasonable alternative avenues of communication. The third cause of action alleges that the ordinance is vague and overbroad.

Both parties filed motions for summary adjudication of the first and third causes of action. The City filed a motion to stay or dismiss the action on abstention grounds. The Court on January 12, 1998 denied the City's motion to stay or dismiss the action. In the same Order, the Court granted the City's motion for summary adjudication of the equal protection component of the first cause of action. The Court denied the plaintiffs' motion for summary judgment in its entirety.

III. Discussion

A. Legal Standard for Reconsideration

Central District Local Rule 7.16 provides that

> [a] motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise [of] reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.

A manifest showing of failure to consider material facts includes failure to consider such facts in light of the applicable law. Reconsideration is thus appropriate if the court's order "committed clear [legal] error." *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *see also, In re Cypress Semiconductor Sec. Litig.*, 836 F. Supp. 711, 713 (N.D. Cal. 1993).

B. Reconsideration of Summary Adjudication of First Amendment Issue Within First Cause of Action

1. Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that a motion for summary judgment shall be granted if the moving party establishes that there is no genuine issue as to any material fact and that the moving party is entitled

to judgment as a matter of law. Such a showing can be made by an affirmative demonstration in affidavits or declarations by a moving party who bears the burden of proof on the controverted issue at trial. In a circumstance where the non-moving party has the burden of proof at trial, summary judgment is appropriate if the non-moving party fails to come forward with any evidence which would create a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986).

The Court must look to the substantive law at issue to determine which facts are "material." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). In deciding whether a dispute is "genuine," the court must determine whether a reasonable jury could return a verdict for the non-moving party. *Id.* at 248-50, 106 S. Ct. at 2510-11. It is the moving party's burden to establish that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party, however, has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553.

The First Amendment portion of the Summary Judgment Order requires reconsideration because the Court clearly erred in determining which facts were material under the substantive law governing this case. Under First Amendment secondary effects doctrine as established in *Renton*, only facts that were before the City Council at the time of enactment are material to the issue of whether the ordinance was content-neutral and justified by a substantial government interest. Therefore, if, as

the Court found in the Summary Judgment Order, the 1977 Studies and other material submitted by the City fail to demonstrate that the content-neutral purpose of the ordinance justifies the ordinance's limitations on combination bookstore/arcades, then no facts regarding the current secondary effects of bookstore/arcades are material.

2. Reconsideration of Substantive First Amendment Standard

This case is governed by the First Amendment "secondary effects doctrine" under *Renton*. Ordinarily, the government may not apply time, place and manner restrictions based on the content of speech. *Id.*, 475 U.S. at 46-47, 106 S. Ct. at 928. Although the ordinance here targets adult-entertainment businesses based on specific definitions of adult content, such restrictions are not content-based if the predominant purpose of their enactment is to ameliorate deleterious secondary effects of such businesses. *Id.* at 48.

A content-neutral time, place and manner restriction on speech is constitutional if it furthers a substantial government interest and is narrowly tailored to affect no more speech than is essential to the furtherance of that interest. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 80, 96 S. Ct. 2440, 2457 (1976) (Powell, J., concurring) (citing *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968)). The City has the burden of proof at trial to show that in enacting the multiple use ordinance

it relied upon evidence permitting the reasonable inference that multiple uses in one business would have harmful secondary effects. *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987). Because the City has the burden of proof on this issue, the plaintiffs' burden on summary judgment "may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence" to support the City's burden to show that the ordinance was enacted to advance a substantial government interest in achieving a content-neutral purpose. *Celotex*, 477 U.S. at 325, 106 S. Ct. at 2554.

In the adult entertainment context, the Ninth Circuit has used a three-step analysis to determine whether an ordinance is a valid time, place and manner restriction. *See Tollis*, 827 F.2d at 1332. The first step is to determine whether the ordinance bans the plaintiffs' expressive conduct altogether. If it does, it is not a "time, place and manner restriction," but rather a presumptively invalid prior restraint.[3] *Id.* The second step is to determine whether the ordinance should be analyzed as content-based or content-neutral. Where, as here, the ordinance on its face differentiates on the basis of content, the issue

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[3] Prior restraints must meet strict scrutiny. That is, they must be necessary and serve a compelling government interest. In the First Amendment adult entertainment context, the compelling interest is usually the protection of minors from material that, while not obscene for adults, would be obscene for minors. *See Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1249 (1997). Here, because the City would bear the burden to meet strict scrutiny, and because the City has not come forward with evidence to meet this burden, a conclusion that the ordinance must be analyzed as a prior restraint results in summary judgment for the plaintiffs.

is whether the predominant purpose in enacting the ordinance was to ameliorate adverse secondary effects of speech rather than to suppress speech itself. *Id.* Again, if the purpose of the ordinance is not content-neutral, it is a presumptively invalid prior restraint. If the restriction is content-neutral, the third step is to determine whether the restriction serves a substantial government interest, is narrowly tailored to serve that interest and allows for reasonable alternative avenues of communication. *Id.*; *see also Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 122 n.*, 112 S. Ct. 501, 511 n.* (noting that under *Renton* "regulations must be 'narrowly tailored' to advance the interest asserted by the State"). Although the regulation must be narrowly tailored to serve a substantial government interest, it need not be the least restrictive means of serving that interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746 (1989); *Renton*, 475 U.S. at 52, 106 S. Ct. at 931 (noting that state and local governments have broad latitude to choose means of ameliorating secondary effects).

The second and third steps are linked, in that the legislature must have a reasonable basis to believe that the restriction will ameliorate harmful secondary effects which the government has a substantial interest in reducing in order for the restriction to be found content-neutral. The Summary Judgment Order, however, found that the content-neutrality requirement of *Renton* was satisfied by the City Council's expression in the preamble of the ordinance of a content-neutral purpose to ameliorate secondary effects. (Order at 24:1-25:28.) The Summary Judgment Order reasoned that the substantial government interest prong should be examined separately, and that it

could be satisfied by evidence of conditions arising long after enactment of the ordinance. (Order at 26-38.)

Upon reconsideration, the Court concludes that this aspect of the Summary Judgment Order was clearly in error. This reasoning would allow a municipality to regulate speech based on an assertion of harmful secondary effects without any showing that such secondary effects exist. Ninth Circuit precedents following *Renton* require a greater showing that secondary effects actually exist. "The [local government] must show that in enacting the particular limitations it places upon adult theaters, it relied upon evidence permitting the reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects." *Tollis*, 827 F.2d at 1333.

The Summary Judgment Order clearly erred by extending a Ninth Circuit precedent in which an adult entertainment ordinance was invalidated because the harmful secondary effect no longer existed to support the proposition that an adult entertainment ordinance could be justified as content-neutral based on secondary effects that emerged after its enactment. *See Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989). In *Acorn*, the Ninth Circuit held that a secondary effects regulation was no longer valid because the conditions underlying the substantial government interest served by the regulation no longer existed. *Id.* at 221-22. The Summary Judgment Order extended this holding to support the proposition that a municipality could rely on post-enactment evidence to meet its burden to show that the ordinance was content-neutral and served a substantial government interest. The holding in *Acorn*, however, cannot be read to relax the burden on the government to

show content-neutrality at the time of enactment, but rather to tighten the government's burden, imposing on the government a continuing obligation to show that the restrictions serve a substantial government interest.[4]

The Summary Judgment Order determined as a matter of law that the 1977 Studies, because they considered only the secondary effects of concentrations of separate businesses, did not provide a reasonable basis for the City Council to believe that a single combined bookstore/arcade led to harmful secondary effects.

The genuine issue for trial, according to the Summary Judgment Order, was whether the plaintiffs' combined bookstore/arcades were separate businesses, and therefore created the concentration effects observed in the 1977 Studies. (Order at 38.) This conclusion is clearly erroneous, because the present separateness of the bookstore and arcade parts of the plaintiffs' businesses was not before the City Council at the time of the enactment of the multiple use ordinance in 1983. There is no dispute in this case that the only facts before the City Council at the time of enactment were the 1977 Studies and the staff reports recommending the multiple use amendment. The

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[4] Even if the Ninth Circuit were to adopt the standard in *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 336 (1997), which allows post-enactment evidence of content-neutral legislative intent, the result in the Summary Judgment Order still would be incorrect. *Phillips* stands for the proposition that the government may meet its burden to show content-neutrality with evidence that was not part of an official legislative record. *Id.* at 178-79. The material facts, however, are still limited to "a factual basis for a legislative judgment" at the time it was made. *Id.* at 178.

staff reports did not present any new evidence or studies as to the effects of combination businesses, but merely expressed the view that the 1978 ordinance contained a loophole allowing separate businesses to exist within 1000 feet of each other if they shared an exterior wall. (*See* 3 Def.'s RJN Ex. 5.) The staff reports thus did not consider the secondary effects of combination businesses such as those of the plaintiffs, which, through the 1984 multiple use amendments, were brought within the coverage of the ordinance without any showing of harmful secondary effects. Because the imposition of a secondary effects regulation of speech under such circumstances violates the First Amendment, the Summary Judgment Order erred in not granting the plaintiffs' motion for summary adjudication of this issue.

The City contends that the plaintiffs' motion for summary judgment should be denied, and its motion granted, because the undisputed legislative history of the zoning ordinance and the multiple use amendment show that the City Council relied upon evidence from which it could reasonably conclude that any concentration of adult business [sic] cause harmful secondary effects. The issue posed by the First Amendment secondary effects doctrine, however, is whether the City Council relied on evidence from which it could have reasonably concluded that this specific form of concentration, the operation of a combination adult arcade and bookstore on the same premises, creates the type of adverse secondary effects identified in the 1977 Studies. The Court concluded in the Summary Judgment Order, and concludes again upon reconsideration, that the City has not raised a genuine issue that would allow the finder of fact to conclude that

the 1977 Studies treated multiple activities within a single store as a form of concentration. The only material factual issue controlling the First Amendment claim concerns the type of conclusions the 1977 Studies can reasonably support. The absence of a genuine dispute as to this issue requires summary adjudication of the first cause of action for the plaintiffs.

The Court here reiterates its factual findings and conclusions of law with regard to the legislative history of the multiple use amendment:

The police department study, entitled "The Impact of Sex Oriented Businesses in the City of Los Angeles" compared crime and arrest statistics for the Hollywood area to citywide crime and arrest statistics during the period from 1969 to 1975. (4 Def.'s RJN Ex. 5 at 653.) The study concluded that an increase in prostitution, robberies, assaults and thefts for the Hollywood area was positively correlated with an increase in adult entertainment businesses in the area. (*Id.* at 655.) The study considered four types of adult businesses: "hard-core motels," "bookstores," "theaters," and "massage parlor/scam joints." (4 Def.'s RJN Ex. 5 at 657.)

In addition to its objective component, the police department study included letters from police officers stating their personal observations that crime had increased in Hollywood with the growth of adult entertainment businesses. (*Id.* at 662-71.) The police department study also included a section entitled "Letters from Businessmen, Clubs, Churches, Etc., Regarding Hollywood." (*Id.* at 672-828.) The letters, numbering in the hundreds, generally express opposition to the content of

adult entertainment, and urge the police department to do everything possible to shut down adult entertainment businesses.

The planning department study, entitled "Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles" concluded that the concentration of adult entertainment businesses had deleterious effects on the community. The objective portion of the planning department study selected five areas of "known concentrations of adult entertainment businesses." (*Id.* at 379.) The five "study areas" were compared to nearby "control areas" selected for their lack of adult entertainment businesses. The study measured changes in assessed value of land and improvements for properties in the study areas and control areas from 1970 to 1976. (*Id.*)

The planning department study counted four types of adult entertainment businesses for purposes of defining an area of high concentration: "massage parlors," "bookstores/arcades," "theaters," and "adult motels." (*Id.* at 380-87.) The study does not state whether the businesses classified as "bookstores/arcades" were free-standing bookstores or arcades, or combination bookstore/arcades.

The study concluded that assessed property values increased in all of the study areas from 1970 to 1976. (*Id.* at 383.) Two areas of adult entertainment concentration registered much higher increases in property values than did their control areas. (*Id.* at 383-88.) Three of the study areas registered lower rates of increase than did their

control areas. (*Id.*) The objective portion of the study concluded that

> there would seem to be some basis to conclude that the assessed value of property within the study areas containing concentrations of adult entertainment businesses have *generally* tended to increase to a lesser degree than similar areas without such concentrations. However, there would appear to be insufficient evidence to support the contention that concentrations of sex-oriented businesses have been the *primary cause* of these patterns of change in assessed valuations between 1970 and 1976.

(*Id.* at 388-89.)[5]

The planning department study also included a report from the police department on changes in the concentration of adult businesses in the entire City of Los Angeles from 1975 to 1976, updating and expanding the police department study described above, which considered only Hollywood during the period from 1969-75. (*Id.* at 414-16.) This updated police department report classified adult entertainment uses as "adult motels," "massage parlors," "bookstores/arcades," and "theaters." (*Id.* at 414.)

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[5] The planning department study also included subjective components, one of which was a mail survey of real estate agents and appraisers to determine their opinion on the impact of concentrations of adult entertainment businesses on property values. The majority of the respondents indicated their belief that adult entertainment businesses had a negative impact on property values. (*Id.* at 396-406.)

The City contends that the planning department study identified "bookstores and adult arcades as distinct adult entertainment businesses for purposes of its work." (Defendant's UF ¶ 39.) The City correctly points out that the introduction to the planning department study names arcades and bookstores separately among the adult entertainment establishments considered by the study. (*Id.*) The Court finds, however, that the body of the study, in categorizing adult businesses for purposes of determining the effects of their concentration, treats bookstore/arcade combinations as single businesses. In defining areas of concentration, the study treats bookstores/arcades as a single unit of adult entertainment whose secondary effects arise from proximity to several other units of adult entertainment. The study does not analyze bookstore/arcade combinations as concentrations of adult entertainment businesses, but rather analyzes bookstore/arcade combinations as single business whose harmful secondary effects arise from concentration with other businesses.[6]

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[6] The planning department study's inapplicability to the question of whether a single adult entertainment business has harmful secondary effects is also demonstrated by the study's method for selecting "control areas." By definition such areas were deemed not to have *concentrations* of adult businesses. Two of the five control areas, however, contained single adult businesses. (*See* 3 Def.'s RJN Ex. 5 at 380 (Hollywood Blvd. and Highland Ave. control area, Vermont Ave. and Santa Monica Blvd. control area). The City, therefore, cannot rely on the study to show harmful secondary effects of single adult entertainment businesses in the absence of concentration with other businesses.

The City contends that because many of the adult entertainment businesses in the studies were classified as "bookstores/arcades," the studies support a finding that the combination of a bookstore and arcade on the same premises creates the adverse secondary effects found in the studies. (Def.'s UF ¶ 43.) The City's argument, however, ignores the purposes and conclusions of the studies. The studies were not directed at determining the impacts of individual adult entertainment businesses. Instead, the studies were concerned with the impacts created by concentrations of numerous adult entertainment businesses in small areas. The stated purpose of the studies was to determine whether a "dispersal" zoning ordinance of the type approved in *Young* would be appropriate for Los Angeles. (*See* 3 Def.'s RJN Ex. 5 at 357.)

By categorizing certain businesses as "bookstores/arcades," and examining areas where such bookstores/arcades were found in close proximity to several other adult entertainment businesses, the studies determined not the impact of a bookstore/arcade on the surrounding area, but the impact of bookstores/arcades as part of a concentration with other adult businesses. The existence in the studies of the bookstores/arcades category does not support the City's contention that it has a substantial interest in separating bookstores from arcades. To the contrary, the fact that bookstores/arcades were studied as unitary businesses militates in favor of a finding that the studies do not demonstrate that such a combination business is a concentration leading to the adverse secondary effects demonstrated by the studies. *See Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1335 (9th Cir. 1987) (holding that city failed to establish that restriction on

proximity to a church of the city's only adult theater was justified by its substantial interest in preventing concentration of adult businesses, because one adult business could not be concentrated with itself).

The facts about the operation of the plaintiffs' businesses are undisputed. The City does not dispute that the bookstore and arcade operations take place in one "relatively small" storefront of 2500-3000 square feet, with one entrance from the street, one counter and cash register, and, during most hours, one employee monitoring the operations. (*See* Def.'s Separate Statement of Genuine Issues, filed Aug. 18, 1997, ¶¶ 5-10 (indicating that the facts regarding the operations of the stores are undisputed).) The City does not dispute the fact that "[t]he video viewing booths and retail sales of both stores occur in the same commercial space within a single building." (*Id.* ¶ 9.) The arcade booths are used to promote rentals and sales from the bookstore. (Wiener Decl. ¶¶ 13, 15.)

Based on these undisputed facts about the combined nature of the bookstores/arcades, the Court concludes that there is no genuine issue of fact as to whether the 1977 Studies dealing with concentrations of separate businesses could have been reasonably relied upon to support application of the multiple use prohibition to the plaintiffs' businesses.

The City contends that the bookstore and arcade components should be treated as separate for purposes of secondary effects analysis because the ordinance defines bookstores and arcades as separate uses. *See* LAMC § 12.70(B)(17). The City contends that the police power to zone uses of land includes the ability to define certain

activities as separate uses, even if they take place in the same business establishment. The City points to zoning regulations that define bakeries, dry cleaners, candy stores, drugstores, florists, grocery stores, butcher shops, delicatessens, automobile repair garages, and automobile services stations as separate uses, even though they may be operated in a single location. *See* LAMC § 12.13. (Def.'s Second RJN Ex. 15.)

The City asserts that "[t]he City's Zoning Code defines many businesses, *both adult and non-adult*, as being separate uses even though they may be operated at a single location." (Def.'s UF ¶ 79 (emphasis added).) The City's authority to define businesses as separate uses without reference to protected speech may not be questioned by this Court if there is any rational basis for the classification. The classification of certain adult entertainment activities as separate businesses, however, is subject to a different standard of review because the City applies these definitions only to businesses that engage in protected speech. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68, 101 S. Ct. 2176, 2182-83 (1981) (noting that standard applied to judicial review of zoning power depends on "the nature of the right assertedly threatened or violated;" where property rights are affected, rational basis review applies; where free speech rights are infringed, zoning law "must be narrowly drawn and must further a sufficiently substantial government interest"). Because the separate business definitions in LAMC § 12.70(C) apply only to adult entertainment uses, and therefore discriminate on the basis of protected speech, they are subject to a higher level of review than rational basis, even when, as here, they are treated as content-

neutral under *Renton*. Thus, unlike the bakery, grocery, and service station definitions, the adult entertainment business definitions must be narrowly tailored to serve a substantial government interest. The City may not require adult bookstores/arcades to separate their businesses without demonstrating that the conduct of these activities in the same building has the adverse secondary effects demonstrated by the 1977 Studies. The City's reliance on the zoning regulations applicable to bakeries and groceries would only be justified if the City required that all bookstore/arcade combinations be defined as separate businesses regardless of adult content. Such an across-the-board regulation would be subject only to rational basis review. But where, as here, the City applies the restriction only to bookstores/arcades that engage in protected speech, the higher standard of review must be applied. *See Christy v. City of Ann Arbor*, 824 F.2d 489, 493 (6th Cir. 1987) (holding that adult entertainment regulations under *Renton* require "more than a rational relationship . . . between the ordinance and this government interest" to justify discrimination based on protected speech).

In addition, the City points to the different treatment of bookstores and "coin-operated amusements," such as arcades, in zoning regulations other than the adult entertainment ordinance. (Def.'s UF ¶¶ 81-88; Eberhard Decl. ¶¶ 5-9.) The City points to the declaration of Franklin Eberhard, the Deputy Director of the Department of City Planning, and one of the authors of the 1977 planning department study. Eberhard declares the City has "historically regulated amusement enterprises separately from retail uses" because the two types of business involve

different types of impact on the surrounding community. (Eberhard Decl. ¶¶ 4-7.) A bookstore, as a retail operation in which the customers buy goods for consumption off-site, has a different impact in the form of "noise, hours of operation, parking and loitering," than does a video arcade which provides on-site public entertainment. (*Id.*)

Eberhard's declaration would be dispositive if the question were whether the City had a rational basis for an across-the-board regulation separating all bookstores from all video arcades. The City's police power clearly encompasses regulations meant to reduce noise, parking and loitering. The multiple use ordinance at issue here, however, applies to a set of bookstores/arcades defined by their exercise of protected speech. As discussed above, in order to single out businesses based on speech without violating the First Amendment, the City must demonstrate that the adult bookstore/arcade combination produces adverse secondary effects that would not be produced by a non-adult bookstore/arcade combination. *See Schad*, 452 U.S. at 73-74, 101 S. Ct. at 2185 (holding that municipality failed to demonstrate that live entertainment restricted by ordinance would produce secondary effects that would not also be produced by other, non-restricted commercial activity).

In addition, Eberhard makes the more general assertion that he has "had the opportunity to study the effects of the provision of more than one type of business at a single location" and that in his experience "a location that only has one business does not have as many impacts on the surrounding community compared to a location with more than one business." (Eberhard Decl. ¶ 10.) While Eberhard's declaration might be sufficient to defend an

ordinance that prohibited all multiple uses, it is irrelevant to the issue of whether an ordinance that prohibits multiple uses based on content violates the First Amendment. The argument that more than one business in a location has harmful secondary effects does not justify prohibiting multiple uses only for adult entertainment business and not for other types of businesses. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31, 113 S. Ct. 1505, 1517 (1993) (rejecting application of secondary effects doctrine to ban on use of newsracks to dispense commercial handbills because city made no showing that secondary effects were unique to commercial newsracks and not also caused by newspaper racks which were not regulated); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225, 110 S. Ct. 596, 604 (1990) (noting that where generally applied licensing scheme is more onerous with respect to sexually oriented businesses than with respect to the majority of other businesses, First Amendment rights are implicated).

Even if the plaintiffs' operations are considered single businesses, the City contends that a finding of secondary effects from concentration of adult businesses should be applied broadly to include concentrations of activities within a single business. The only circuit court holding on multiple use adult entertainment regulations supports the City's contention. In *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), the Fourth Circuit upheld an ordinance similar to the one at issue here. The ordinance defined an "adult establishment" as any adult bookstore, adult motion picture theater, adult mini motion picture theater, or massage business, and prohibited the operation of more than one establishment in one building. *Id.* at 823. The only evidence offered to show the secondary

effect of multiple uses was a report from the county health department on the unsanitary conditions found on a visit to five adult arcades. *Id.* at 829 n.9. The Fourth Circuit held that the health department report supported regulation of the secondary impact of adult arcades by prohibiting their operation in conjunction with another adult entertainment business.

Hart Book Stores, decided seven years before *Renton,* is inconsistent with controlling Ninth Circuit authority decided after *Renton.* The Ninth Circuit has required local governments to justify secondary effects regulations by showing that the conduct regulated actually produces the secondary effects that the government invokes to justify the regulation. *Acorn,* 887 F.2d at 224. If, as here, the City justifies the regulation based on secondary effects produced by concentration of businesses, it must demonstrate that the conduct restricted relates to concentration. *Id.* It may not point to other secondary effects, such as unsanitary conditions within the businesses, that have nothing to do with the concentration of such businesses within a given area. The Court respectfully concludes that the Fourth Circuit in *Hart Book Stores* erred by treating testimony regarding unsanitary conditions inside a video arcade as related to secondary effects of concentrations of adult entertainment businesses.

The City is correct in asserting that this case is like *Hart Book Stores.* There, as here, the government failed to demonstrate that the combination of adult entertainment businesses in a single building is the equivalent of a concentration of separate adult businesses in a neighborhood. While such a failure passed constitutional muster in *Hart Book Stores,* it is fatal under the secondary effects

doctrine as applied by the Ninth Circuit. Under *Acorn,* in order for the City to benefit from the content-neutral *Renton* analysis, the City must prove the City Council relied on evidence that would allow it to conclude that multiple uses in a single building created the specific secondary effects asserted in justifying the regulation as content-neutral. *Acorn,* 887 F.2d at 224.

The 1977 Studies on which the City relies to prove a substantial government interest demonstrate the need for a distance requirement for separate adult entertainment businesses. The planning department study did not address the secondary impact of single adult entertainment businesses. The undisputed facts regarding the nature of the plaintiffs' businesses demonstrate that they are not separate in the sense that the businesses addressed in the 1977 Studies were separate.

The evidence produced by the City does not create a genuine issue which if decided in the City's favor would meet its burden to show that the City Council relied on evidence supporting a reasonable belief that combination businesses, such as those of the plaintiffs, produced harmful secondary effects of the type asserted as the content-neutral justification for the ordinance. The Court therefore grants the plaintiffs' motion for summary adjudication of the First Amendment issue.

C. Reconsideration of the Equal Protection Issue Within the First Cause of Action

1. Selective Settlement Theory

The plaintiffs contend that the Court failed to consider material evidence in the form of conflicting declarations regarding the possible "grandfather" status of the *Topanga Press* plaintiffs, with whom the City settled, consenting to a permanent injunction against enforcement of the multiple use ordinance. The plaintiffs contend that possible grandfather status provides the only possible rational basis for the City's decision to settle with the previous plaintiffs while not settling with the instant plaintiffs. The Summary Judgment Order declined to consider the evidence regarding possible grandfather status, concluding that such evidence was not material in light of the City's broad discretion to selectively enforce its ordinances, so long as such selections have an improper basis, such as racial discrimination or the exercise of fundamental rights. (Order at 41 n.8.)

The plaintiffs contend that the Court erred in determining that the grandfather evidence was irrelevant, because, according to the plaintiffs, their claim is not based on selective enforcement, but rather on the theory that the City granted the *Topanga Press* plaintiffs a permanent "administrative exemption" from the multiple use ordinance. This exemption purportedly allows the *Topanga Press* plaintiffs to compete unfairly with the present plaintiffs, who remain bound by the ordinance.

Additionally, the plaintiffs contend that the only difference between them and the *Topanga Press* plaintiffs is that the *Topanga Press* plaintiffs exercised their right of

free speech earlier. The plaintiffs contend that the timing with which a person exercises a fundamental right cannot be a rational basis for treating that person differently under the equal protection clause.

The plaintiffs rely on *Roe v. Anderson*, 134 F.3d 1400 (9th Cir. 1998). There, the Ninth Circuit affirmed a preliminary injunction in favor of a plaintiff-class of welfare recipients who contended that a residency requirement for receipt of benefits unconstitutionally burdened the constitutional right to interstate travel. The court reasoned that the plaintiffs were likely to succeed on the merits because the equal protection clause does not allow a distinction between long-term California residents and newcomers for the purpose of setting benefit levels. *Id.* at 1404-05.

The plaintiffs here contend that their situation is analogous to that of the *Roe* plaintiffs in that the unlawful distinction in *Roe* was also based on the *timing* of the exercise of a fundamental right.

Roe does not change the equal protection principles applicable here. The distinction challenged in *Roe* was based only on the timing of the welfare applicants' arrival in California. Here, the distinction is based not only on the timing of the adult businesses' exercise of their free speech rights, but also on the entire range of factors that affect an executive decision to prosecute or settle a case. This is a more individuated distinction than the one at issue in *Roe*. While the Fourteenth Amendment prohibits local government from distinguishing between welfare applicants based solely on length of residency, it does not require the government to enforce its zoning ordinances

with absolute uniformity against different businesses, in different locations, at different times. *See Standard Bank & Trust Co. v. Village of Orland Hills*, 891 F. Supp. 446, 451 (N.D. Ill. 1995) (rejecting equal protection challenge to municipality's decision to begin enforcing previously unenforced building codes).

Put simply, the City can legitimately and constitutionally decide to settle one case because it does not think it can win, and refuse to settle another case with a similarly situated plaintiff because it does think it can win.

Because the equal protection clause does not entitle the plaintiffs to a settlement offer on the same terms as that offered to previous plaintiffs, the Court denies the motion for reconsideration as to this aspect of the equal protection claim.

2. Classification Based on Exercise of Fundamental Right

The Summary Judgment order denied both the City's and the plaintiffs' motions for summary adjudication of the equal protection issue under this theory. The Supreme Court has held that municipalities may use the content of sexually oriented entertainment businesses as the basis for placing them in a different classification from other businesses, provided that the regulation is directed at harmful secondary effects. *Young*, 427 U.S. at 71. Because the *Renton* doctrine views such regulation as directed toward secondary effects rather than toward expressive conduct, no fundamental right is implicated. Thus, the classification in question is not between businesses that engage in protected expressive conduct and those that do

not, but rather between businesses that cause harmful deleterious effects associated with adult entertainment and those that do not.

As discussed above, the Court finds that the City has failed to show a genuine issue of fact in support of the contention that the multiple use amendment serves a content-neutral purpose. Therefore, the ordinance's classification of multiple use businesses based on adult content is subject to the strict scrutiny standard applicable to classifications based on exercise of a fundamental right.

Under strict scrutiny, the classification must be necessary to promote a compelling or overriding government interest. This is the same test that applies to prior restraints of free speech under the First Amendment. As discussed above, the City's failure to demonstrate a genuine issue of fact as to content-neutral justification of the multiple use ordinance requires analysis of the ordinance as a presumptively invalid prior restraint. Because the City has not come forward with evidence at summary judgment to show that the multiple use ordinance is necessary to serve a compelling government interest, the Court must grant the plaintiffs' motion for summary judgment on the first cause of action based on both the First Amendment and Equal Protection issues.

D. Reconsideration of Vagueness Issue in Third Cause of Action

The plaintiffs contend that the Court improperly reached the merits of the vagueness challenge after concluding that the plaintiffs lacked standing to advance it. The plaintiffs argued at summary judgment that if their

facial challenge failed, they would be unable to conform their conduct with the ordinance because the definition of "adult" bookstore and arcade is too ambiguous to allow the plaintiffs to reduce their stock of adult material by an amount certain to bring them under the definition. (*See* Order at 45.)

The Court first concluded that the plaintiffs lacked standing to assert the vagueness claim because the plaintiffs conceded that the ordinance applied to their businesses as currently constituted. (Order at 45:15-27.) The Court reasoned that the plaintiffs might have standing in the future, if they reduced their percentage of adult material in an attempt to remove their businesses from the coverage of the ordinance. Until then, however, the Court concluded that the vagueness challenge was unripe.

The Court, however, then proceeded to analyze the merits of the vagueness claim and concluded, in what would have to be dicta, that the California courts had construed similar adult entertainment ordinances in such a manner as to make the definition of "substantial portion" sufficiently clear to provide notice as to which businesses are affected by the statute.

The plaintiffs correctly point out that the Supreme Court and the Ninth Circuit precedents on which the Summary Judgment Order relied did not reach the merits of the vagueness claims after concluding that the plaintiffs lacked standing. *See Young*, 427 U.S. at 61, 96 S. Ct. at 2448; *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1215 (9th Cir. 1984). The plaintiffs also point to a

recent Supreme Court opinion, in which the Court disapproved an innovation known as "hypothetical jurisdiction," whereby a court would be able to determine the merits of an action in the absence of standing, if the merits determination would have the same result as the standing determination. *Steel Co. v. Citizens for A Better Environment*, 118 S. Ct. 1003, 1012 (1998).

Under the principle announced in *Steel Co.* it was error for the Summary Judgment Order to reach the merits of the vagueness issue after determining that the plaintiffs lacked standing.

In light of the foregoing, the Court grants the motion to alter or amend the Summary Judgment Order.

The Court here reiterates its conclusion of law that the plaintiffs do not have standing to assert a vagueness claim. In *Young* and *Renton*, the Supreme Court rejected similar vagueness claims on the grounds that the plaintiffs conceded that the ordinances clearly applied to them. *Young*, 427 U.S. at 59; *Renton*, 475 U.S. at 55 n.4. The Ninth Circuit has held that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Stoianoff v. State of Montana*, 695 F.2d 1214, 1218 (9th Cir. 1983). Because there is no question as to the applicability of the ordinance to the plaintiffs, the Court rejects the vagueness challenge for lack of standing.

The plaintiffs argue that they will have standing if the preliminary injunction is lifted and they are faced with the task of bringing their businesses into compliance with the ordinance, or bringing their businesses out from under the definition of "adult entertainment." The fact

that the plaintiffs have these choices in the event that they lose this lawsuit demonstrates that their vagueness challenge under this theory is not ripe for judicial resolution.

IV. Conclusion

Because the plaintiffs correctly contend that the Summary Judgment Order improperly relaxed the burden imposed on the City to justify secondary effects regulation of speech, and misapplied the standard for summary judgment, the Court grants the motion to reconsider the First Amendment portion of the Summary Judgment Order, and grants the plaintiffs' motion for summary adjudication of this issue.

Because the Equal Protection portion of the Summary Judgment Order correctly applied the standards for selective prosecution to the claims based on the City's refusal to settle this case, the Court denies the motion for reconsideration of this portion of the Summary Judgment Order.

Because the Summary Judgment Order improperly proceeded to the merits of the vagueness challenge after determining that the plaintiffs lack standing to assert the challenge, the Court grants the motion to alter or amend the Summary Judgment Order to vacate the merits discussion.

The previous Summary Judgment Order is vacated.

Based on the findings of fact and conclusions of law detailed above, the Court grants the plaintiffs' motion for summary adjudication of the first cause of action. The

City has failed to raise a genuine issue of fact that would allow a reasonable fact finder to conclude that the multiple use ordinance is a content-neutral secondary effects regulation. The ordinance must therefore be analyzed as a presumptively invalid prior restraint. The City has offered no evidence to overcome the presumption of invalidity. The Court therefore grants summary adjudication for the plaintiffs on the first cause of action based on violation of the First and Fourteenth Amendments. The Fourteenth Amendment violation arises from the ordinance's disparate treatment of adult entertainment businesses based on the exercise of protected speech. Summary adjudication of the Fourteenth Amendment claim based on selective settlement is granted in favor of the City.

Summary adjudication of the First Amendment issue raised in the first cause of action renders moot the issues presented in the second and third causes of action. Summary adjudication of the First Amendment issue in the first cause of action also entitles the plaintiffs to a declaration of the ordinance's facial invalidity, and to a permanent injunction against its enforcement. *See Doe v. Gallinot*, 657 F.2d 1017 (9th Cir. 1981).

The Court enters final judgment for the plaintiffs in a separate order as required by Federal Rule of Civil Procedure 58, and by the same order grants a declaration and permanent injunction. An injunction against enforcement of the ordinance is within the Court's power to grant "[f]urther necessary or proper relief" to effect the judgment. 28 U.S.C. § 2202; *Gallinot*, 657 F.2d at 1025. The Court adopts the previous findings of irreparable injury, inadequacy of legal remedies, and balance of interests in

the plaintiffs' favor made in support of the preliminary injunction. (*See* Preliminary Injunction (entered Dec. 20, 1995) at 5:13-6:13.) *See also, Topanga Press*, 989 F.2d at 1528 (noting that any loss of First Amendment freedoms can constitute irreparable injury).

Dated: 5-28-98

/s/ Dean D. Pregerson
DEAN D. PREGERSON
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., et al., Plaintiffs, v. CITY OF LOS ANGELES, Defendant.	Case No. CV 95-7771 DDP (CTx) JUDGMENT AND PERMANENT INJUNCTION (Filed May 28, 1998)

This action came on for hearing before the Court, on October 20, 1997 and April 13, 1998, on Motions for Summary Judgment. The evidence presented having been fully considered, the issues having been duly heard and a decision having been duly rendered, the Court issues the following declaration and permanent injunction.

DECLARATORY JUDGMENT

Los Angeles Municipal Code ("LAMC") § 12.70(C), to the extent it prohibits an adult business owner from conducting more than one type of adult business activity, as defined in LAMC § 12.70, as part of a single business operation within a single store, violates the free speech clause of the First Amendment and the equal protection clause of the Fourteenth Amendment of the United States Constitution in that LAMC § 12.70(C) restricts adult entertainment multiple use businesses based on the content of their speech without advancing a content-neutral government interest.

PERMANENT INJUNCTION

The Court, having found that the portions of LAMC § 12.70(C) prohibiting multiple adult entertainment uses within a single business establishment violate the First and Fourteenth Amendments, that the deprivation of constitutional rights caused by their enforcement would create irreparable injury, and that hardships created by such deprivations outweigh the hardships imposed on the defendant by inability to enforce the ordinance, ORDERS that:

Defendant City of Los Angeles, a municipal corporation, and its officers, agents, employees and attorneys, are permanently enjoined from enforcing in any criminal, civil or administrative proceeding the portions of LAMC § 12.70(C) which prohibit the establishment, operation, or maintenance of an adult bookstore and adult arcade, as defined in the ordinance, within a single building, where the bookstore and arcade are operated as part of the same business within a single store.

Dated: 5-28-98

/s/ Dean D. Pregerson
DEAN D. PREGERSON
United States District Judge

APPENDIX D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAMEDA BOOKS, INC., A California corporation; HIGHLAND BOOKS, INC., a California corporation, Plaintiffs-Appellees, v. CITY OF LOS ANGELES, Defendant-Appellant.	No. 98-56200 DC# CV-95-07771-DDP (CTx) Central California ORDER (Filed Sept. 18, 2000)

Before: BOOCHEVER, HAWKINS, and THOMAS, Circuit Judges.

The panel has voted to deny Defendant-Appellant's petition for rehearing. Judge Boochever has recommended denial of the petition for rehearing en banc and Judges Hawkins and Thomas have voted to deny the en banc petition.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and for rehearing en banc is denied.

APPENDIX E

ORDINANCE NO. 151294

An ordinance amending Chapter 1, Article 2 of the Los Angeles Municipal Code to add Section 12.70, Adult Entertainment Zoning, in order to regulate adult entertainment businesses, as defined therein, in the City of Los Angeles.

WHEREAS, in recent years there has been a growing concern on the part of public officials and residents of the City of Los Angeles regarding the appearance of a blighting and degrading effect upon certain neighborhoods of the City from the concentration of sex-oriented, adult entertainment businesses in such neighborhoods; and

WHEREAS, based upon said concern, the Los Angeles City Council instructed the City Planning Department on January 12, 1977, to conduct a comprehensive study, with the assistance of the Police Department, City Attorney and other appropriate City agencies, to determine whether and to what extent the concentration of such adult entertainment businesses has a blighting and degrading effect upon the neighborhoods in which they are situated; and

WHEREAS, the findings of the above-mentioned study, which included testimony from public hearings, indicated that the concentration of such adult entertainment businesses tends to result in the blighting and degrading of the areas of such concentration; and

WHEREAS, in order to prevent the further concentration of such adult entertainment businesses and to protect the character of the City's neighborhoods, the City Council enacted a zoning moratorium on August 9, 1977, as an

urgency ordinance, temporarily prohibiting the establishment of an adult entertainment business, as defined therein, within 1,000 feet of another such business or within 500 feet of any church, school, park, playground or area zoned for residential use; and

WHEREAS, in order to allow sufficient time for additional study of this matter and the preparation of a permanent adult entertainment zoning ordinance, the Council directed on November 23, 1977, that said zoning moratorium remain in effect until August 11, 1978, or until such time as said permanent adult entertainment zoning ordinance has been enacted, whichever first occurs; and

WHEREAS, it is a compelling interest of the City of Los Angeles that a permanent adult entertainment zoning ordinance be enacted in order to preserve the public health, peace, safety and general welfare by regulating adult entertainment businesses in such a manner as to prevent their further concentration and the continued erosion of the character of affected neighborhoods of the City;

NOW THEREFORE:

THE PEOPLE OF THE CITY OF LOS ANGELES

DO ORDAIN AS FOLLOWS:

Section 1. Section 12.70 is hereby added to the Los Angeles Municipal Code, to read as follows:

Sec. 12.70. ADULT ENTERTAINMENT ZONING:

A. PURPOSE. It is the purpose and object of this section to establish reasonable and uniform regulations to

prevent the continued concentration of adult entertainment businesses, as defined herein, within the City of Los Angeles.

B. DEFINITIONS. For the purpose of this section, certain terms and words are defined as follows:

1. "Adult Arcade" – An establishment where, for any form of consideration, one or more motion picture projectors, slide projectors or similar machines, for viewing by five or fewer persons each, are used to show films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

2. "Adult Bookstore" – An establishment which has as a substantial portion of its stock-in-trade and offers for sale for any form of consideration any one or more of the following:

(a) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas;" or

(b) Instruments, devices or paraphenalia which are designed for use in connection with "specified sexual activities."

3. "Adult Cabaret" – A nightclub, bar, restaurant or similar establishment which regularly features live performances which are characterized by the exposure of "specified anatomical

areas" or by "specified sexual activities," or films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

4. "Adult Motel" – A motel or similar establishment offering public accomodations [sic] for any form of consideration which provides patrons with closed-circuit television transmissions, fi!ms, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

5. "Adult Motion Picture Theater" – An establishment where, for any form of consideration, films, motion pictures, video cassettes, slides or similar photographic reproductions are shown, and in which a substantial portion of the total presentation time is devoted to the showing of material which is characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

6. "Adult Theater" – A theater, concert hall, auditorium or similar establishment which, for any form of consideration, regularly features live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."

7. "Establishment" – As used in Subsection C hereof, the "establishment" of an adult entertainment business shall mean and include any of the following:

(a) The opening or commencement of any such business as a new business;

(b) The conversion of an existing business, whether or not an adult entertainment business, to any of the adult entertainment businesses defined herein;

(c) The addition of any of the adult entertainment businesses defined herein to any other existing adult entertainment business; or

(d) The relocation of any such business.

8. "Massage Parlor" – An establishment where, for any form of consideration, massage, alcohol rub, fomentation, electric or magnetic treatment, or similar treatment or manipulation of the human body is administered, unless such treatment or manipulation is administered by a medical practitioner, chiropractor, acupuncturist, physical therapist or similar professional person licensed by the State of California. This definition does not include an athletic club, health club, school, gymnasium, reducing salon, spa or similar establishment where massage or similar manipulation of the human body is offered as an incidental or accessory service.

9. "Public Park" – A park, playground, swimming pool, beach, pier, reservoir, golf course or athletic field within the City of Los Angeles which is under the control, operation or management of the City Board of Recreation and Park Commissioners or the County Department of Beaches.

10. "Religious Institution" – A building which is used primarily for religious worship and related religious activities.

11. "School" – An institution of learning for minors, whether public or private, which offers instruction in those courses of study required by the California Education Code or which is maintained pursuant to standards set by the State Board of Education. This definition includes a nursery school, kindergarten, elementary school, junior high school, senior high school or any special institution of learning under the jurisdiction of the State Department of Education, but it does not include a vocational or professional institution or an institution of higher education, including a community or junior college, college or university.

12. "Sexual Encounter Establishment" – An establishment, other than a hotel, motel or similar establishment offering public accomodations, which, for any form of consideration, provides a place where two or more persons may congregate, associate or consort in connection with "specified sexual activities" or the exposure of "specified anatomical areas." This definition does not include an establishment where a medical practitioner, psychologist, psychiatrist or similar professional person licensed by the State of California engages in sexual therapy.

13. "Specified Anatomical Areas" – As used herein, "specified anatomical areas" shall mean and include any of the following:

(a) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus or female breasts below a point immediately above the top of the areolae; or

(b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

14. "Specified Sexual Activities" – As used herein, "specified sexual activities" shall mean and include any of the following:

(a) The fondling or other erotic touching of human genitals, pubic region, buttocks, anus or female breasts;

(b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation or sodomy;

(c) Masturbation, actual or simulated; or

(d) Excretory functions as part of or in connection with any of the activities set forth in (a) through (c) above.

15. "Substantial Enlargement" – As used in Subsection C hereof, the "substantial enlargement" of an adult entertainment business shall mean the increase in floor area occupied by the business by more than fifty percent (50%), as such floor area exists on the effective date of this section.

16. "Transfer of Ownership or Control" – As used in Subsections C and E hereof, the "transfer of ownership or control" of an adult entertainment business shall mean and include any of the following:

(a) The sale, lease or sublease of such business;

(b) The transfer of securities which constitute a controlling interest in such

business, whether by sale, exchange or similar means; or

(c) The establishment of a trust, gift or other similar legal device which transfers the ownership or control of such business, except for transfer by bequest or other operation of law upon the death of the person possessing such ownership or control.

C. PROHIBITION. No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theater, Adult Theater, Massage Parlor or Sexual Encounter Establishment within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park within the City of Los Angeles.

D. MEASUREMENT OF DISTANCE. The distance between any two adult entertainment businesses shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of each business. The distance between any adult entertainment business and any religious institution, school or public park shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of the adult entertainment business to the closest property line of the religious institution, school or public park.

E. EXCEPTIONS.

1. A person possessing ownership or control of an adult entertainment business which is within 1,000 feet of another such business or

within 500 feet of any religious institution, school or public park on the effective date of this ordinance shall be permitted to transfer such ownership or control within two (2) years of said effective date. The person acquiring such ownership or control, however, shall be required to discontinue said adult entertainment business within five (5) years from the date of said transfer of ownership or control, if such business continues to be within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park.

2. A person possessing ownership or control of an adult entertainment business shall be permitted to transfer such ownership or control if such business is not within 500 feet of any religious institution, school or public park and the only other adult entertainment business or businesses within 1,000 feet of such business have been established under a variance from the requirements of this section, pursuant to the variance provisions set forth in Section 12.27 of this Code. This exception shall not, however, apply to an adult entertainment business which has been established under such a variance.

F. SEVERABILITY. If any provision or clause of this section or the application thereof to any person or circumstance is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other section provisions, clauses or applications thereof which can be implemented without the invalid provision, clause or application thereof, and to this end the provisions and clauses of this section are declared to be severable.

Sec. 2 The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, at its meeting of July 18, 1978.

REX E. LAYTON, City Clerk,
By /s/ [Illegible],
Deputy.

Approved Jul. 28, 1978

/s/ Tom Bradley,
Mayor.

Approved as to Form and Legality

7-11-78
BURT PINES, City Attorney,

By /s/ John C. Funk
JOHN C. FUNK
Deputy.

File No. 74-4521

Pursuant to Section 97.2 of the City Charter, the City Planning Commission on 6-29-78 recommended that this ordinance by adopted by the City Council.

/s/ Raymond J. Morrison
Secretary

APPENDIX F

ORDINANCE NO. 157538

An ordinance amending Section 12.70 of the Los Angeles Municipal Code to clarify its provisions.

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. Subdivision 7 of Subsection B of Section 12.70 of the Los Angeles Municipal Code is hereby amended to read:

7. "Establishment" – As used in Subsection C hereof, the "establishment" of an adult entertainment business shall mean and include any of the following:

(a) The opening or commencement of any such business as a new business;

(b) The conversion of an existing business, whether or not an adult entertainment business, to any of the adult entertainment businesses defined herein; *or*

(c) The relocation of any such business.

Sec. 2. Subsection B of Section 12.70 of the Los Angeles Municipal Code is hereby amended by adding Subdivision 17 thereto, to read as follows:

17. "Adult Entertainment Business" – Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theatre, Adult Theatre, Massage Parlor, or Sexual Encounter Establishment, as defined herein, and

each shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment.

Sec. 3. Subsection C of Section 12.70 of the Los Angeles Municipal Code is hereby amended to read:

C. Prohibition. No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an adult entertainment business within 1,000 feet of another adult entertainment business or within 500 feet of any religious institution, school or public park within the City of Los Angeles. Notwithstanding any provision of the Los Angeles Municipal Code to the contrary, no person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof, or the increase of floor area of any adult entertainment business in any building, structure or portion thereof containing another adult entertainment business.

Sec. 4. Subsection E of Section 12.70 of the Los Angeles Municipal Code is hereby amended by adding Subdivision 3 thereto, to read as follows:

3. Except for an adult entertainment business required to be discontinued pursuant to Subdivision 1 of this Subsection, if more than one adult entertainment businesses exists in the same building, structure or portion thereof, then all may be continued until March 10, 1985. At that time all shall be discontinued except those established prior to September 1, 1978; but if none of the adult entertainment businesses were established prior to September 1, 1978, then all shall be discontinued except

for one, and in case of a dispute the adult entertainment business established first shall have the priority right to continue. However, the right to continue an adult entertainment business until March 10, 1987 may be granted pursuant to Section 12.27-B,8.

Sec. 5. Subdivision 8 is hereby added to Subsection B of Section 12.27 of the Los Angeles Municipal Code to read as follows:

8. Continuance of Adult Entertainment Businesses

An adult entertainment business required to be discontinued pursuant to Section 12.70-E,3 may be continued until March 10, 1987 if the Zoning Administrator finds that:

(i) the adult entertainment business is subject to a written lease, entered into prior to March 10, 1982, with a termination date extending beyond March 10, 1985; or

(ii) that discontinuance of the adult entertainment business by March 10, 1985 will result in undue financial hardship, because the adult entertainment business involves the investment, made prior to March 10, 1982, of money in real property, improvements, or stock in trade.

No application for continuance shall be granted if the Zoning Administrator makes a finding that the adult entertainment business is in violation of any provision of this Chapter, and the violation was not corrected after notice being given thereof.

An application for a continuance of an adult entertainment business shall be filed in the Office of Zoning

Administration upon a form and accompanied by such data and information as has been prescribed for that purpose. Each such application shall be verified by the owner or lessee of the property involved. No fee shall be required.

Upon filing of a verified application, the Zoning Administrator shall investigate the matter and make a decision thereon as expeditiously as possible. Such decision shall be made within 75 days from the date the matter is filed, or within such extended period of time as may be mutually agreed upon by the applicant and the Zoning Administrator. A copy of the Zoning Administrator's findings and determination shall be placed on file in the City Planning Department and a copy of the determination furnished to the applicant, the Department of Building and Safety, and the Director of Planning. If necessary, the Zoning Administrator may set the matter for hearing giving notice to the applicant and to the other interested parties of the time and place of such hearing.

Appeals from determinations by the Zoning Administrator may be taken to the Board in the same manner prescribed by Section 12.28 of this Code. No determination shall become effective until 15 days have elapsed from the date of mailing a copy of the written determination to the applicant. During this period an appeal may be filed with the Board by any person aggrieved by the determination, or by any officer, board, department or bureau of the City. An appeal shall stay all proceedings in furtherance of the action appealed from pending its determination.

Sec. 6. Statement of Purpose

There is concern on the part of public officials and residents of the City of Los Angeles regarding the adverse impacts which result from the continued concentration of adult entertainment business. Based upon this concern, the Los Angeles City Council in 1977 instructed the City Planning Department to conduct a comprehensive study, with the assistance of other City agencies, to determine whether and to what extent the concentration of such adult entertainment businesses has a blighting and degrading effect upon the neighborhoods in which they are situated.

The findings of this study, which included testimony from public hearings, indicated that the concentration of such adult entertainment businesses tends to result in the blighting and degrading of the areas of such concentration. In order to prevent the further concentration of these adult entertainment businesses and to protect the character of the City's neighborhoods, the City Council enacted Section 12.70 of the Los Angeles Municipal Code known as the "Adult Entertainment Ordinance" which prohibits the establishment of an adult entertainment business, as defined therein, within 1,000 feet of another such business, or within 500 feet of any religious institution, school, or public park.

Nevertheless, there have been a number of instances in which two or more adult entertainment business [sic] have been established or maintained at the same location or operated as a single commercial enterprise. This concentration of adult entertainment businesses tends to have an adverse impact on the neighborhood in which

they are located and is contrary to the dispersal approach taken by the City in enacting the Adult Entertainment Ordinance.

The purpose of this ordinance is to clarify existing provisions of the Adult Entertainment Ordinance. In enacting this ordinance in 1978, the City Council did not intend to permit the establishment of more than one adult business in the same building or at the same location. This ordinance will clarify Council's intent in that regard and provide reasonable amortization provisions applicable to businesses established after September 1, 1978 in a manner inconsistent with Council's intent.

Sec. 7. Severability

If any section, subsection, or subdivision of this Ordinance is held to be unconstitutional or otherwise invalid, such decision shall not affect the validity of the remaining provisions of this Ordinance.

Sec. 8 The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, at its meeting of Mar. 16, 1983.

ELIAS MARTINEZ, City Clerk,

By /s/ Edward W. [Illegible], Deputy.

Approved Mar. 22, 1983

/s/ Tom Bradley, Mayor.

Approved as to Form and Legality

2/24/83
IRA REINER, City Attorney,

By /s/ Claudia McGee Henry
CLAUDIA McGEE HENRY
Assistant City Attorney

File No. 82-0155

Pursuant to Section 97.8 of the City Charter, approval of this ordinance recommended for the City Planning Comission

See attached report.

/s/ Calvin S. Hamilton
Director of Planning ka

APPENDIX G

ORDINANCE "A"

The Los Angeles Daily Journal C436

ORDINANCE NO. 158579

An Ordinance amending Section 12.70 of the Los Angeles Municipal Code and providing for an exception therefrom.

Section 1. Subsection C of Section 12.70 of the Los Angeles Municipal Code is hereby amended to read:

C. Prohibition. No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an adult entertainment business within 1,000 feet of another adult entertainment business, or within 500 feet of a religious institution, school, or public park within the City of Los Angeles. No person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof, or the increase of floor area of any adult entertainment business in any building, structure or portion thereof containing another adult entertainment business.

No person shall cause or permit the establishment, or substantial enlargement of an adult entertainment business within 500 feet of any lot in an "A" or "R" zone, or within the "CR", "C1", or "C1.5" zones in the City of Los Angeles.

Sec. 2. Subsection E of the Section 12.70 of the Los Angeles Municipal Code is hereby amended by adding Subdivision 4 thereto, to read as follows:

4. An adult entertainment business may be established and maintained pursuant to Section 12.22-A,20.

Sec. 3. Subsection A of Section 12.22 of the Los Angeles Municipal Code hereby amended by adding subdivision 20 thereto to read as follows:

20. Adult Entertainment Businesses.

(a) Notwithstanding the prohibition contained in Section 12.70-C, a person may establish or transfer ownership or control of an adult entertainment business on a lot within 500 feet of an "A" or "R" zone, if a site consistent with Section 12.70-C is not reasonably available elsewhere in the City for the establishment of the subject adult entertainment business. A site is "reasonably available" elsewhere in the City if it satisfies all of the following criteria:

(i) Its use as a proposed adult entertainment business is consistent with all applicable zoning regulations, including Section 12.70-C.

(ii) It is available for use, purchase, or rental as an adult entertainment business.

(iii) It has adequate street access, street lighting and sidewalks.

(iv) It is at least 500 feet away from any uses which are or may become obnoxious or offensive by reason of emission of odor, dust, smoke, noise, gas, fumes, cinders, refuse matter or water carried waste.

This exception shall not apply to massage parlors or sexual encounter establishments.

b) Prior to the establishment, or transfer of ownership or control, of an adult entertainment business pursuant to this Subdivision, an application for an exception shall be filed in the Office of Zoning Administration upon a form prescribed for that purpose, identifying the present or proposed location of the subject adult entertainment business, and accompanied by data supporting the exception request, and the fee provided for in Section 19.01-N of this Code.

An application for an exception shall be reviewed in accordance with the procedures described in Section 12.24-C,3 to the extent applicable. However, a hearing shall be held and decision made within 60 days from the date of filing of an application. An exception shall be approved if it meets all the requirements of paragraph (a) above. An appeal from the determination of the Zoning Administrator on whether an exception meets all of the requirements of paragraph (a) may be taken to the Board and Council in the same manner as prescribed in Section 12.28 for appeals from Conditional Uses enumerated in Section 12.24-C,1.1. However, decision on any appeal shall be made within 30 days of the expiration of the appeal period.

If the Zoning Administrator, Board or Council, disapproves an exception request, then a finding of fact shall be made showing wherein the proposed exception fails to meet the requirements of paragraph (a).

Sec. 4. Section 19.01 of the Los Angeles Municipal Code is hereby amended by adding a Subsection N to read as follows:

N. ADULT ENTERTAINMENT BUSINESS EXCEPTION.

Type of Application	Filing Fee	Fee for Each Appeal
Exception from the Prohibition Against Adult Entertainment Businesses Within 500' of an "A" or "R" Zone.	$200.00	One-half filing fee

Sec. 5. Severability.

If any provision or clause of this ordinance or the application thereof to any person or circumstance is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other section provisions, clauses or applications thereof which can be implemented without the invalid provisions, clause or application thereof, and to this end the provisions and clauses of this section are declared to be serverable [sic].

Sec. 6 The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, at its meeting of Dec. 16, 1983.

ELIAS MARTINEZ, City Clerk,

By /s/ Edward W. [Illegible],
Deputy.

Approved Dec. 16, 1983

/s/ Tom Bradley,
Mayor.

Approved as to Form and Legality

Dec. 16, 1983
IRA REINER, City Attorney,

By /s/ Claudia McGee Henry
CLAUDIA McGEE HENRY
Assistant City Attorney

File No. C.F. 81-3526

(2)

Supreme Court, U.S.
FILED
JAN 5 2001
CLERK

No. 00-799

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding unconstitutional an ordinance prohibiting adult video viewing machines from operating within adult bookstores where the ordinance prohibited such unitary businesses even though any asserted secondary effects caused by such businesses were presumably already ameliorated by the fact that such stores had to be located in specified commercial or industrial districts, and had to comply with, and did comply with, all *adult* zoning restrictions, including the requirement that such a store not operate within 500 feet of any church, school, park or residential zone, nor within 1,000 feet of any other adult entertainment business?

2. Did the Court of Appeals err in finding unconstitutional an ordinance prohibiting adult video viewing machines from operating within adult bookstores where the only type of secondary effects relied upon by the City were those assertedly caused by a *clustering* of multiple unrelated adult businesses, and the legislative record failed to show reliance on any studies which suggested that the secondary effects of such businesses varied depending on the number or type of separately defined adult use activities occurring within any one such business?

3. Did the Court of Appeals err in finding unconstitutional an ordinance prohibiting adult video viewing machines from operating within adult bookstores where the legislative record showed no greater secondary effects being caused by adult bookstores containing video viewing booths than caused by businesses consisting solely of video viewing booths?

QUESTIONS PRESENTED – Continued

4. Did the Court of Appeals err in finding unconstitutional an ordinance prohibiting adult video viewing machines from operating within adult bookstores where there was substantial evidence showing that such machines had existed for many years within traditional adult bookstores, and there was no evidence that such machines had ever been operated or existed as an independent stand-alone business, nor was any evidence submitted showing that a separate business consisting solely of such machines could likely survive?

5. Did the Court of Appeals err in finding unconstitutional an ordinance prohibiting adult video viewing machines from operating within adult bookstores where the uncontroverted evidence showed that respondents' adult bookstores offered many thousands of adult videotapes for rental or purchase for home viewing, and also allowed customers, for a fee, to preview any of those video tapes in the video machines before rental or purchase, and where there was no other method by which consumers could, as effectively, obtain truthful information about the contents of individual videotapes, to assist them in deciding which ones to purchase or rent for home viewing?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents Alameda Books, Inc. and Highland Books, Inc., adopt the Statement of the Case presented by the City of Los Angeles in its Petition for Writ of Certiorari except to the extent specifically noted below:

1. The City asserts that "[t]he 1977 study documented that the concentration of adult entertainment businesses resulted in increased crime, decreased property values, and generally caused blight and other negative impacts in the neighborhoods where they concentrated." Pet. at 3. The City's assertion is materially inaccurate.

First, the 1977 study (the "study") did *not* document that a concentration of adult entertainment businesses results in decreased property values. In fact, the Study showed the exact opposite. The 1977 study measured the changes in property values over time in five selected areas where there were concentrations of adult businesses. In each of those five areas, property values *increased*. Additionally, the City's 1977 study compared the rate of increase in those five test areas to five "control" areas in the same general part of town but without adult businesses. The study found that property values in two of the five areas with adult business concentrations increased *more rapidly* than in the respective control areas where there were no adult businesses. The City's own study ultimately concluded that it did *not* support the

assertion that adult businesses caused decreased property values.

Second, the study did not fairly demonstrate that adult businesses cause increased crime. The study merely noted that, over a one year period, the Hollywood area had a higher incidence of crime than the entire City of Los Angeles. Because there was a higher concentration of adult businesses in Hollywood than other parts of the City, the study jumped to the conclusion that the adult businesses were the *cause* of the slightly increased crime rate. The study made no attempt to pinpoint which features of Hollywood might account for the slightly increased crime rate, but simply *assumed* that the adult businesses were the primary cause.[1]

---

[1] For example, Hollywood, which is simply a district within the City of Los Angeles, is one of the city's most concentrated areas for live entertainment of all types, as well as one of its most heavily commercial areas. It is entirely possible that commercial areas generally have higher rates of crime than the City at large. It is also possible that areas which attract large numbers of tourists and feature numerous restaurants and non-adult motion picture theaters have higher crime rates than the overall crime rates of the entire City.

Likewise, Hollywood has considerably older structures than the City average, and it also has a far greater percentage of transients. There is also a greater percentage of persons living in poverty in the Hollywood area than the City average.

None of these possibilities were considered by those drawing conclusions in the 1977 study, even though any one of those factors could be an equally plausible basis to explain Hollywood's higher crime rate, and certainly, the combination of *all* of them would provide a far more plausible explanation for the slightly higher crime rate in Hollywood than the rest of the City.

In any event, the study's reported heightened crime rate in Hollywood included numerous urban crimes not generally associated with adult businesses, such as forgery, counterfeiting, embezzlement, fraud, and suicide. Moreover, the study provided no data to indicate that these crimes were occurring *inside* any adult entertainment business, nor did the study examine the issue of whether any particular *combinations* of adult business uses were likely to increase the frequency of such crimes in the surrounding areas.

Finally, to the extent that the study attempted to enumerate the various types of adult entertainment businesses then existing in Los Angeles, it did not include or find any stand-alone businesses called "adult arcades." Instead, the only so-called "adult arcades" were those found to exist as integral component parts of existing adult bookstore businesses.

2. In discussing the motivations for enactment of the 1983 ordinance amendment which established the provision challenged in this case, the City asserts that "it was discovered" that the measurement of distance provision "was being interpreted in such a manner as to permit a combination of such businesses to be located within the exterior structural walls of a single building at one site." Pet. at 5. This is somewhat misleading. The 1983 Staff Report that suggested the need for a modification of the ordinance was merely an observation that the City's own Building and Safety Department routinely construed and interpreted the 1978 ordinance as posing no bar to an adult bookstore's including individual viewing booths as part of a single integrated business. This tends to suggest

that, prior to enactment of the 1983 ordinance, city officials did not contemplate the type of restriction which would later be added by the 1983 amendment here under review, notwithstanding the self-serving, unsupported and seemingly false language to the contrary found in the statement of purpose for the 1983 amendment.

3. The City has omitted the following potentially relevant facts of record from its discussion of the operation of the two respondents' businesses:

a. Both Highland Books and Alameda Books are relatively small retail stores. The area open to the general public in the two businesses is approximately 2,500 and 3,000 square feet, respectively.

b. Both Alameda Books and Highland Books sell and rent sexually oriented products, including videotapes, and both stores provide video viewing booths in which, for a small fee, customers can view or preview the many thousands of different videotapes that are available for sale and/or rental in the store.

c. The method of operation of the two stores is virtually identical. During most of the hours of operation, a single employee works at the store, a counter clerk who "rings up" retail sales and supervises operation of the store's video viewing booths. That employee also gives change and checks identification to ensure that no minors gain access to sexually-oriented materials.

d. The video viewing booths and retail sales areas of both stores are located in the same commercial space within a single building. In Alameda Books, no walls separate the video viewing booths from the retail portion of the premises. In Highland Books, the video booths,

while in the same store as the retail sales, are in a somewhat separated portion of the store connected to the retail sales by a common interior entrance way.

e. In each store, one manager (or clerk) supervises the entire location. There is only one entrance/exit door (other than emergency exits) to the entire store. That entrance is the only access from the outside to either the video booths or the retail sales areas of the store. Customers may freely walk about the premises, entering and exiting the video viewing booths and browsing through the store.

f. Both Highland Books, Inc. and Alameda Books, Inc., are the sole owners and operators of the entirety of each respective business, including both the retail sales and rental aspects of the stores and the video arcade portion of the store.

g. Alameda Books has 15 video viewing booths. Highland Books has 19 video viewing booths.

h. After a customer has watched the videos of his or her choice in the video viewing booths, the customer can then go to the clerk on duty and purchase or rent any of the videos in the store.

i. Both Alameda Books and Highland Books carry approximately 6,500 different titles of sexually oriented videotapes for rental or retail sale. Both stores allow customers to view or preview *any* of these thousands of video tapes in the store's video preview booths. Specifically, a customer who is interested in a particular videotape may bring it directly to the counter clerk and request to preview it. After paying a small fee to the counter clerk, the customer is then directed to one of the video

preview booths, and the clerk activates that videotape. After viewing the tape in the preview booth, the customer may elect to either purchase or rent it for subsequent home viewing.

j. At all relevant times, there has existed in both Highland Books and Alameda Books a prominently displayed commercial sign which, in pertinent part, states the following to all customers:

> "ALL VIDEOS IN THIS STORE ARE AVAILABLE FOR RENT, PREVIEW, AND/OR SALE. A CASH, VISA OR MASTERCARD DEPOSIT EQUAL TO THE PRICE OF THE VIDEO IS REQUIRED."

k. In both Highland Books and Alameda Books, and on a regular basis, customers who have viewed a videotape in one of the video viewing booths will proceed to either rent or purchase one of the videos they have just previewed.

4. The uncontroverted facts of record established that there is no such thing as an "adult arcade business" which exists in the real world independent of some other primary business such as an adult bookstore.

5. Previewing adult videotapes in the store where they are available for purchase or rental is the best source of consumer information regarding the content of such videos. One significant practical effect of the challenged ordinance is to entirely ban all video viewing and previewing machines from adult book and video stores throughout Los Angeles, and thereby deprive the public of the best available source of truthful information for making decisions about which videotapes to purchase or rent.

6. Respondents' "waiver" was slightly more limited than its characterization by the City. Pet. at 8. By virtue of

a previous discovery agreement with the City, respondents agreed they would put on no evidence to show that adult arcades could not survive independent of an adult bookstore, and further agreed that they would not affirmatively assert or attempt to prove that no adult arcade can survive economically, unless operated in conjunction with an adult bookstore on the same premises. However, respondents have always taken the position that it is the *City's* burden, in order to present a *prima facie* defense, to affirmatively establish that its ordinance would not unduly restrain expression, and to show that it has defined as an independent adult use a type of business which in fact *exists* (or at least which *could* exist) in the real world. Consequently, respondents never stipulated that they would refrain from arguing that the City has the burden of proof on this issue, nor did respondents agree to refrain from arguing that the City has failed to affirmatively show that such businesses could in fact survive as independently operating businesses. In fact, the City presented no evidence whatsoever on this point.

7. L.A.M.C. § 103.101, which became effective on November 7, 1977, places additional restrictions on businesses containing video viewing booths, including that the booth have a prescribed level of illumination and that the interior of each booth be entirely visible. The potentially ameliorating impact of that ordinance on any potential adverse secondary effects is not reflected in the City's 1977 study, which had concluded by June of 1977.

8. Currently, L.A.M.C. § 12.70C also prohibits adult businesses, including adult arcades, from operating within 500 feet of "a religious institution, school, or public park within the City of Los Angeles," and also within

500 feet of "any lot in an 'A' [agricultural] or 'R' [residential] zone, or within the 'CR', 'C1', or 'C1.5' [limited commercial] zones in the City of Los Angeles."

9. Both of respondents' businesses are properly situated in commercial zones and comply with all of the locational restrictions of L.A.M.C § 12.70C other than the one challenged herein (i.e., neither business is within 500 feet of any church, school, park or residential or agricultural zone, nor within 1,000 feet of any other adult entertainment business).

REASONS FOR DENYING THE WRIT

A. Almost No Other Jurisdictions Have An Ordinance Like The One Stricken By The Court Of Appeals.

Among many other reasons, this Court need not address the validity of the Los Angeles ordinance here under review as it is one of very few of its type throughout the entire nation.

Prior to the opinion in this case, the only other published opinion involving a similar ordinance was over 20 years ago.[2] Although an ordinance similar to this one was approved in *Hart*, in the intervening 21 years, no other published opinion has analyzed such an ordinance. The primary reason for this seems to be that local governments simply have not embraced this rather peculiar regulation, likely because it does nothing to further any

[2] *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979).

governmental interest. Indeed, the only other opinion which even *mentions* such an ordinance is *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1071, n.25 (N.D.Tex. 1986), where the court notes that, even though Dallas had an ordinance similar to this one, city officials had construed it so as to permit "one business to deal in several different media." *Id.* In short, nothing in the record suggests that ordinances as restrictive as the one in this case are in widespread circulation or are anything other than aberrations. Accordingly, there would appear to be no pressing need for this Court to address their constitutionality.

B. No Significant Conflict Among The Circuit Courts Of Appeals Merits This Court's Review.

Although there is one Court of Appeals decision reaching a *result* contrary to this one,[3] that 1979 ruling was issued prior to numerous significant decisions of this Court which bear on the proper mode of analysis of such ordinances. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (articulating use of time, place and manner test when analyzing adult zoning ordinances); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (supplying gloss on correct application of time, place and manner test); *Turner Broadcasting System v. F.C.C. (Turner II)*, 520 U.S. 180 (1997) (articulating elements of the test of "intermediate scrutiny" to be used in First Amendment cases involving content-neutral legislation); and *Edenfield v. Fane*, 507 U.S. 761 (1993) (articulating relevant elements of rapidly evolving test for commercial speech).

[3] *Hart, supra.*

Given that *none* of these significant rulings was available to guide the 1979 court deciding *Hart*, a conflict solely between *Hart* and the current case is hardly one needing to be addressed by this Court.

Again, if this were in fact an issue of burning concern among the circuits, there would no doubt have been other cases analyzing such an ordinance in the last 21 years than the one referenced in the City's Petition.

C. Contrary To The City's Assertion, The Opinion Of The Court Of Appeals Does Not Conflict With This Court's Decision In *Renton*.

The City claims that "[t]he opinion of the Court of Appeals deals with an issue of federal constitutional law in a way which directly conflicts with this Court's decision in *Renton*." Pet. at 10. That is simply not so.

In *Renton*, this Court upheld an adult zoning ordinance and specifically held that the appropriate test for analyzing such a restriction should be the First Amendment's familiar test for analyzing "time, place and manner regulation[s]." 475 U.S. at 46. That is precisely what the Court of Appeals utilized to analyze the challenged Los Angeles ordinance in the present case.

Indeed, the Court of Appeals adopted the formulation of the time, place and manner test it most recently articulated in *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998), *cert. den'd*, ___ U.S. ___, 120 S.Ct. 1553, 146 L.Ed.2d 459 (2000), where it *upheld* very strict restrictions

on adult entertainment businesses. Specifically, the *Colacurcio* test, as approved and articulated by the Court of Appeals' opinion herein, is as follows:

> "[M]unicipalities may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are: (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information."

Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719, 722 (9th Cir. 2000), *quoting Colacurcio v. City of Kent* (163 F.3d at 551), citing in turn, to this Court's decision in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

The opinion below is also consistent with the more specific guidance this Court provided in *Renton* for applying the time, place and manner test in adult business cases. While *Renton* made clear that a city need not conduct its own studies "or produce evidence independent of that already generated by other cities," it nonetheless required that "whatever evidence the city relied upon" must be found to be evidence which "is reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52.

While the City reads *Renton* as giving municipalities carte blanche to enact limitless time, place, and manner restrictions on adult businesses short of a total prohibition, *Renton* did not go nearly so far and, indeed, its insistence that it was applying the traditional "time, place and manner" test suggests that any such interpretation of *Renton* would be wholly at odds with *Renton's* express language.

In any event, the Court of Appeals, guided by the express mandate in *Renton*, required the City to make at least a minimum threshold showing, i.e., it required the City to establish that it relied upon evidence which it "reasonably believed to be relevant to the problem that the city addresses." *Id.*

Most of the City's briefing and oral argument before the Court of Appeals asserted that the City's 1977 study supplied the requisite evidence which the City then was entitled to "reasonably believe" supported its ordinance. However, the Court of Appeals looked closely at that entire study and concluded that, while the 1977 study supported the significant separation requirements between autonomous adult businesses imposed by the City's original 1978 adult zoning ordinance, the 1977 study did not provide any reasonable basis for the drastic 1983 expansion of those restrictions to prohibit adult bookstores from continuing to operate if one or more adult video viewing booths were situated on the premises.[4] This was an eminently fair and reasonable reading of the legislative record, as the City's 1977 study never made any attempt to evaluate whether independently operating "multiple-use" adult businesses created any greater adverse secondary effects on the surrounding community than other adult entertainment businesses

[4] Taking the City's argument to its unavoidable and inevitable conclusion, it could prohibit a single business use from selling more than one category of item, thus requiring a separate retail outlet for adult books, another for adult magazines, another for adult videotapes, and so on.

which fit into only one of the arbitrarily[5] defined adult business categories established by the City's ordinance scheme.

Neither did the City Council rely on such studies of any other city. There are none.

The City has now apparently recognized the futility of attempting to establish a "reasonable basis" for enactment of the 1983 ordinance in its 1977 study. Accordingly, it has now shifted its focus before this Court and asserts the alternative proposition, barely mentioned in the lower courts, that its current ordinance can instead be justified based upon studies of *other* cities or, alternatively, based upon judicial opinions recognizing and adopting such studies. Quite apart from the fact that the City barely even mentioned this issue in the court below, there simply is no conflict between the Court of Appeals' ruling and this Court's *Renton* decision even when measured from the perspective of this newly-pressed alternative theory.

Specifically, *Renton* states that the evidence upon which a city relies in enacting an ordinance must be "reasonably believed to be relevant to the problem that the city addresses." 475 U.S. 51-52. However, even to the extent that *Renton* allows a city to rely on judicial opinions endorsing the results of other studies, the plain fact is that the Los Angeles City Council, in 1983, could not

[5] The word "arbitrarily" is used above because the record shows that the City was acting arbitrarily in defining an adult business called an "adult arcade" as no such business had ever in fact existed in the real world as a discrete and independent business.

have relied on any studies or judicial opinions rendered *after* 1983. Accordingly, under the test of *Renton*, the only issue is whether there were sufficient studies or judicial opinions in effect prior to 1983, and upon which the City Council in fact relied when enacting the challenged ordinance, to allow the ordinance to pass muster under the time, place and manner test articulated in *Renton*.

However, the City's Petition describes no studies whatsoever (whether in fact considered by the City Council or not) which compared the secondary effects of so-called "multiple-use" adult entertainment businesses to those of "single use" adult entertainment businesses.

Neither does the City's Petition cite any judicial opinions upon which the 1983 City Council relied which opinions had examined and/or endorsed the results of any such studies. Rather, it is clear from the record that the *only* thing considered by the 1983 City Council was the City's 1977 study. Thus, neither the District Court nor the Court of Appeals erred in concluding that that study did not supply a reasonable basis for the drastic expansion of the 1978 restrictions which was stricken below by the Court of Appeals.

CONCLUSION

The ordinance here stricken is not one in widespread use and there is no significant conflict in the lower courts regarding the constitutionality of such an ordinance. Neither is it an ordinance shown to be at all necessary or valuable for protection of the public.

In contrast, there are numerous alternative First Amendment problems with this ordinance which the Court of Appeals was not even required to address which would have independently warranted invalidation of this ordinance. For example, if this ordinance were upheld, it would deprive the public of considerable First Amendment access, effectively preventing not only on-premises viewing of all sexually oriented videotapes in the primary facilities where such products are available, but also preventing the public from the best source of truthful information needed to assist it in making informed decisions about which videotapes to purchase or rent.

Likewise, the ordinance would also be subject to First Amendment challenge for arbitrarily carving up existing unitary expressive businesses into component parts which had never independently existed, and which had not been shown to be capable of independent existence. The principle underlying this type of ordinance, if accepted by the court below, would allow the absolute destruction of any adult bookstore business, simply by arbitrarily defining the sale of each of its wares as separate adult "businesses" which may not occur in the same store.

Lastly, of course, the basis chosen by the Court of Appeals for invalidation of this ordinance was entirely consistent with this Court's mandate in *Renton* that, at a constitutional minimum, cities enacting time, place and manner restrictions of adult businesses must at least show that they relied upon evidence "reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52. The City did not do that here.

For all the reasons above, there is neither any pressing conflict needing to be resolved, nor any opinion which strays from the principles adopted by this Court in *Renton* which would warrant issuance of a writ of certiorari.

DATED: January 5, 2001

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 17 2001
CLERK

No. 00-799

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 3

REPLY TO BRIEF IN OPPOSITION

Reduced to its essentials, this Court's decision in *City of Renton v. Playtime Theatres, Inc.* (*Renton*), 475 U.S. 41 (1986) stands for the proposition that local governments may constitutionally enact zoning regulations that apply only to adult businesses. As shown in the City of Los Angeles' (City) petition, the Court of Appeals fundamentally misapplied that principle, thereby creating a conflict with at least five circuit courts of appeals. The Brief in Opposition (Opposition), because it goes so far afield, supports the need for review by this Court to once again settle the right of municipalities to enact remedial zoning regulations "designed to serve a substantial governmental interest." *Renton*, 475 U.S. at 39.

This brief Reply seeks only to address what petitioner considers to be the four most glaring inaccuracies of the Opposition. Respondents make many comments about the content and meaning of the City's 1977 Study. Opposition at pp. 1-4. In the City's view these comments are inaccurate or incorrect and for the most part outside the record and thus irrelevant. This Reply Brief is not the appropriate vehicle for the City to respond line by line to respondents' comments about the 1977 Study. At this juncture, it is sufficient that the City's 1977 Study has been reviewed by numerous courts and found to be more than adequate to sustain very different zoning ordinances regulating adult businesses from the one at issue here, as well as the precise regulation challenged in this lawsuit. See, Petition at pp. 3-4 fn. 1 and p. 20.

In Part B of the Opposition (at pp. 8-9), respondents assert that review is not warranted on the basis of commercial speech jurisprudence, citing, *inter alia*, *Turner Broadcasting System v. F.C.C.*, 520 U.S. 180 (1997) (*Turner II*). Such reliance is misplaced. This Court has consistently stated that the analysis of zoning ordinances under *Renton* and commercial speech jurisprudence are separate and distinct strands of First Amendment jurisprudence. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 867-868 (1997); *Boos v. Barry*, 485 U.S. 312, 319-321 (1988). District Court Judge Atlas, in her 153 page decision, commented on the application of commercial speech jurisprudence to a First Amendment challenge to the City of Houston, Texas, zoning ordinance. She rejected the application of *Turner II* to zoning ordinances analyzed under *Renton* because it did not pertain to "controlling authority specifically related to the adult entertainment context." *N.W. Enterprises, Inc. v. City of Houston*, 27 F.Supp.2d 754, 799-780 (S.D. Tex. 1998). The same is true here, commercial speech jurisprudence is inapposite. The decision of the Court of Appeals does not follow this Court's decision in *Renton* and is in conflict with other circuits. It is on that basis that review is appropriate and the City's petition should be granted.

Very problematic is respondents' argument that review is not warranted because the City's definitions of adult businesses are "arbitrary." Opposition at p. 13. Respondents conceded in the Court of Appeals that they were not challenging the City's 1978 ordinance. Brief of Appellees at pp. 37-38. The definitions of the separate adult businesses found in the 1978 ordinance (Petition, Appendix E, App. 62-66) have not been amended since.

The constitutionality of these definitions was not challenged below, and in light of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *Renton*, such a challenge would obviously be futile. This argument is improperly raised here.

Equally problematic is respondents' recantation of their prior waiver that an adult arcade cannot economically operate independent of an adult bookstore. Opposition at p. 6, ¶ 6 and footnote 5 at p. 13. It is thus disingenuous for respondents to assert that "the City presented no evidence whatsoever on this point." Opposition at p. 7. The City was at all times ready, willing and able to undertake discovery on that issue, at which point respondents entered into the now recanted "waiver." This argument is also improperly raised here.

As in the Court of Appeals (Brief of Appellees at pp. 43-44) , respondents resort to hyperbole when they assert that the City is somehow free to create ever new ingenious definitions of adult businesses, such as an adult business for books and then one for magazines[1]. Opposition at p. 12 and fn. 4. There is nothing in the record that the City has ever attempted to amend its adult zoning ordinance in the manner contemplated by respondents' whimsical flight of fancy. Such assertions or implications are irrelevant to the legal issue actually litigated, highly speculative and improperly raised here.

---

[1] In Brief of Appellees the list of potential definitions was much longer and included such novel categories as "adult pencil stores" and "adult greeting card stores." Brief of Appellees at p. 43.

Lastly, respondents assert that the City's 1983 amendment restricting multiple uses in one building constituted a "drastic 1983 expansion of those restrictions (of the 1978 ordinance)." Opposition at p. 12. There is no evidence to support the idea that the 1983 amendment was "drastic," i.e., somehow preclusive. To reach such a conclusion, it must first be determined that the City's ordinance does not allow for reasonable alternative avenues of communication, the fourth step of the *Renton* test. Given *Renton*, that is what this lawsuit should really be about. It is an undertaking that the City is supremely confident that it can and will prevail on. This issue, however, was rendered moot when the District Court granted respondents' motion for summary judgment. Petition, Appendix B, App. 55. Otherwise, the 1983 ordinance is no more "drastic" than zoning ordinances regulating the location of adult businesses which have significantly different regulations from the one at issue here. See, e.g., the approved zoning regulations in *Stringfellow's v. City of New York*, 171 Misc.2d 376, 653 N.Y.S.2d 801 (Sup.Ct. 1996), *aff'd*, 241 A.D.2d 360, N.Y.S.2d 812 (App.Div. 1997), *aff'd*, 694 N.E.2d 407 (N.Y. 1998), *cert. denied, sub nom. Amersterdam Video v. City of New York*, 525 U.S. 1067 (1999).

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, review by this Court is warranted and the petition should be granted.

Respectfully submitted,

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No. 00-799

In The

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THE CITY OF LOS ANGELES,

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To The United States Court Of Appeals
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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California Corporation; and HIGHLAND BOOKS, INC., a California Corporation, Plaintiffs, v. CITY OF LOS ANGELES, a municipal corporation, Defendant.	Case No. **DECLARATION OF DAVID M. BROWN IN SUPPORT OF APPLICATION FOR TRO AND OSC**

DECLARATION OF DAVID M. BROWN

(28 U.S.C. § 1746)

I, David M. Brown, hereby declare as follows:

1. I am an attorney, admitted to the State Bar of California. Except as stated otherwise, I have personal knowledge of all facts set forth herein.

2. My business address is 15303 Ventura Blvd., Suite 1400, Sherman Oaks CA, 91403.

3. On or about October 16, 1995, I appeared at a status conference in the downtown civil courthouse of the Los Angeles Superior Court. Opposing counsel in that case was Los Angeles Deputy City Attorney Peter Nelson King.

4. While we were together there, Mr. King and I got into a side conversation in connection with another litigation matter which we had in common, a federal civil rights lawsuit I had filed on behalf of E.W.A.P., Inc. against the City of Los Angeles in federal court, *E.W.A.P., Inc. v. City of Los Angeles*, U.S.Dt.Ct., C.D. Cal. No. CV-95-1711 AWT. The *E.W.A.P.* case involved a lawsuit by the owner of a single "adult entertainment" business which, in the same store, allowed its customers to view so-called "adult" video tapes and also conducted retail sales of sexually-oriented video tapes, magazines and related items. The City had previously taken the position that the operation of such a store, even in an otherwise properly zoned area, constituted a violation of a portion of Los Angeles Municipal Code § 12.70C which states that "[n]o person shall cause or permit the establishment or

maintenance of more than one adult entertainment business in the same building, structure or portion thereof . . . ." E.W.A.P sued the City, seeking a declaration that that ordinance provision was unconstitutional, both on its face and as applied to E.W.A.P.'s store, in violation of applicable free speech guarantees of the First and Fourteenth Amendments to the United States Constitution.

5. The E.W.A.P. store in connection with which I brought that lawsuit was a new store which had first commenced operating in October of 1994.

6. The *E.W.A.P.* lawsuit was heard together with another lawsuit seeking identical relief that had been filed by another similar adult bookstore/arcade business. That case was entitled *Diamond v. City of Los Angeles*, U.S.Dt.Ct., C.D.Cal. No. CV-95-1534 AWT.

7. Federal Judge A. Wallace Tashima issued a preliminary injunction against enforcement of that ordinance in those cases on June 9, 1995.

8. Subsequent to the issuance of Judge Tashima's preliminary injunction, but prior to my October 16th conversation with Mr. King, the E.W.A.P. case was settled on terms which permanently prevented the City from enforcing that ordinance against the plaintiffs in those actions, but which allowed dismissal of the actions without a judicial resolution of the question of the constitutionality of that ordinance provision.

9. In any event, during my October 16th conversation with Mr. King concerning developments in that

E.W.A.P. case, Mr. King mentioned to me that the settlement which we had concluded would leave the City free to attempt to enforce that same ordinance against others not in that action, and that the City in fact intended to attempt to enforce that ordinance in the future should there be an appropriate case (with better facts for the City) in which to enforce it.

10. Mr. King also informed me that he had recently been approached by a member or members of the Los Angeles Police Department who asked him for authority to issue a citation to attempt to enforce that same ordinance provision against the store of one of the plaintiffs in the present lawsuit, Alameda Books, Inc., located at 1901 S. Alameda in the City of Los Angeles.

11. Mr. King informed me that he informed the officer or officers that they were authorized to enforce the ordinance against the Alameda store.

12. Based upon my conversation with Mr. King, it is my belief that the initiation of some type of enforcement activity against the store of plaintiff Alameda Books, Inc., based upon the above-quoted portion of L.A.M.C. § 12.70C, is likely to be imminent.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of November, 1995, within the United States of America.

/s/ David M. Brown
DAVID M. BROWN

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California Corporation; and HIGHLAND BOOKS, INC., a California Corporation, Plaintiffs, v. CITY OF LOS ANGELES, a municipal corporation, Defendant.	Case No. **DECLARATION OF G. RANDALL GARROU IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE AND RE NOTICE OF EFFORTS TO CONTACT OPPOSING COUNSEL UNDER LOCAL RULE 7.18.1(b)**

DECLARATION OF G. RANDALL GARROU

(28 U.S.C. § 1746)

I, G. Randall Garrou, hereby declare as follows:

1. I am one of the attorneys for plaintiffs herein and make this declaration in support of plaintiffs' application for a temporary restraining order and preliminary injunction.

2. I was the lead counsel for plaintiffs in *Topanga Press, Inc., et al, v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), in which the court of appeals upheld the issuance of a preliminary injunction by the Honorable Richard A. Gadbois of this court preventing the City of Los Angeles from enforcing against the 22 businesses involved in that case, among other things, the very ordinance provision challenged in the present lawsuit. The district court case number of that case was C.D. Cal. No. CV 88-7838 RG.

3. Following the Ninth Circuit's affirmation of the district court's preliminary injunction and the Supreme Court's subsequent denial of the City's petition for a writ of certiorari in that case, the City ultimately settled with the 22 business which were involved in that litigation, stipulating to a permanent injunction which conferred permanent grandfather status upon those businesses in return for their agreement to dismiss the lawsuit (including their declaratory judgment claims) without forcing it to a judicial conclusion which would resolve the plaintiffs' underlying constitutional challenges.

4. While the settlement agreement in *Topanga Press* did not purport to preclude the City from further

attempts to enforce against *non-parties* thereto the particular portion of L.A.M.C. § 12.70C challenged herein, *i.e.*, the portion construed by the City to prohibit, within a single store or business, the conducting of two or more adult entertainment activities, I nonetheless was then of the personal belief that the City would not in fact attempt to enforce that provision thereafter.

5. However, in December of 1994, I learned from other lawyers representing two unrelated adult entertainment clients, that the City had indeed threatened enforcement of this very provision against their clients and that each of these two clients had brought independent actions in federal court challenging the constitutionality of this particular ordinance provision. I am informed that those cases were both filed in the Central District of California and bear the following names and numbers: *E.W.A.P., Inc., v. City of Los Angeles*, C.D. Cal. No. 95-1711 AWT; and *Diamond v. City of Los Angeles*, C.D. Cal. No. CV-95-1534 AWT.

6. I am further informed that Judge A. Wallace Tashima of this court issued a preliminary injunction on June 9, 1995, to prevent the City from enforcing this particular provision of L.A.M.C. § 12.70C pending trial in each of those two cases.

7. I am further informed and believe, and on that basis allege, that shortly after the issuance of those preliminary injunctions, the City entered into a settlement agreement in each of those cases similar to the one it had entered into in *Topanga Press* with my clients, *i.e.*, it agreed to stipulate to a permanent injunction preventing it from enforcing the challenged provision of L.A.M.C.

§ 12.70C against those businesses in return for their dismissal of their declaratory judgment claims without a judicial resolution of their underlying constitutional challenges to that ordinance.

8. I am further informed that the business involved in the action entitled *Diamond v. City of Los Angeles* first opened shortly *after* enactment of the 1983 ordinance (prohibiting more than one adult "business" in the same building) which was challenged in that action. I am informed that the business involved in the action entitled *E.W.A.P., Inc. v. City of Los Angeles* commenced operation as a brand new business in October of 1994.

9. Based upon all of these developments, it had been my impression until very recently, that the City had no serious intentions of attempting to enforce this particular provision (*i.e.*, the provision prohibiting a single adult entertainment business from conducting two or more adult business activities on its premises). However, within the law few months, I had a conversation with one of the deputy city attorneys in the Los Angeles City Attorney's Land Use Department (the department which would normally defend the City in any challenge to its zoning ordinances) in which that deputy informed me that the City was still reserving the right, perhaps someday, and in an ideal test case, to enforce that ordinance provision. I did not, however, from that conversation, conclude that any enforcement of the ordinance was imminent.

10. On Wednesday, November 8, 1995, I had a telephone conversation with David M. Brown, the attorney who represented the plaintiff in *E.W.A.P., Inc. v. City of*

Los Angeles, having, called him in connection with an unrelated matter. However, during the course of that conversation, he happened to relate to me that he had been in a conversation with Deputy City Attorney Peter Nelson King within the last few weeks in which Mr. King told Mr. Brown that the City would probably be proceeding with an enforcement action (to enforce this same portion of L.A.M.C. § 12.70C) against the store which Mr. Brown knew to be Alameda Books, located at 1901 S. Alameda Street in the City of Los Angeles, the store of one of the plaintiffs herein. This was the first I had learned that there were any plans, immediate or otherwise, to attempt to enforce this particular ordinance provision against any of the clients which our firm represents.

11. For this reason, it is my belief that plaintiffs are urgently in need of a TRO which would simply preserve the status quo (by temporarily restraining the initiation of any new criminal prosecutions) pending a hearing on their application for a preliminary injunction, where the court, after being fully appraised and hearing full arguments from all parties, can more carefully evaluate the merits of plaintiffs' constitutional challenges.

12. It is also my belief that the City could not conceivably be prejudiced by plaintiffs' request for a TRO in that the only relief being sought is a very brief preservation of a status quo that I understand to have existed at both stores for years. The ordinance here challenged has been on the books since 1983 and the City has not, prior to now, ever initiated any criminal enforcement proceedings against them under this ordinance. Moreover, the

City has repeatedly allowed exemptions to *numerous* businesses from the requirements of this particular ordinance (both by the enactment of express "grandfather" provisions written onto the face of the ordinance, and by stipulating to permanent injunctions against enforcement of this ordinance in at least three prior federal court lawsuits involving approximately 24 different businesses), and it would not have done so if failure to comply with the ordinance would cause it any irreparable injury.

13. As lead counsel for the plaintiffs in the seven cases consolidated under the case name *Topanga Press, Inc., et al. v City of Los Angeles*, I am also aware that Steven Weiner was and is the owner of Beverly Books, Inc., one of the many plaintiffs in the consolidated *Topanga Press* litigation. I am also aware, as lead counsel for plaintiffs herein, that Mr. Weiner is also the sole owner of plaintiffs Highland Books, Inc. and Alameda Books, Inc. Accordingly, the *Topanga Press* litigation and the present litigation involve "essentially the same parties" within the meaning of local rule 4.2.2.

14. Moreover, as lead counsel for plaintiffs in *Topanga Press*, I am also aware that one of the causes of action which Beverly Books, Inc. raised in that litigation was a cause of action for a declaratory judgment determining that the portion of L.A.M.C. § 12.70C prohibiting multiple adult entertainment "businesses" in the same building was unconstitutional in violation of the free speech, due process and equal protection guarantees of the state and federal constitutions. That claim, however, was dismissed prior to any judgment on that claim. For

this reason, I believe that the present case is governed by the procedures set forth in Local Rule 4.2.2 of this Court.

15. Moreover, I believe the purposes of rule 4.2.2. would be served by its application to the present case because members of the Los Angeles City Attorney's office informed me, at the time the *Topanga Press* settlement was being negotiated, that one of their reasons for unilaterally stipulating to the permanent injunction in that case (rather than simply making the case moot by amending the challenged ordinances) was the City's hope that a stipulation to a permanent injunction would render moot the plaintiffs' claims for a declaratory judgment concerning the constitutionality of its adult zoning ordinances, thereby leaving open for another day the underlying constitutional questions. While the City was perfectly entitled to avoid a constitutional determination of the issues raised in *Topanga Press*, it should not be allowed to avoid such a ruling by a judge who had issued a preliminary injunction against it in hopes of later obtaining a more favorable determination of those exact same questions in front of a different federal judge. Such an interpretation would defeat one of the purposes underlying Local Rule 4.2.2. This is particularly true where, as here, the City subsequently repeated this pattern by "mooting out" two more cases raising this same constitutional question (*i.e.*, the *Diamond* and *E.W.A.P.* cases) after the judge before whom such cases were pending similarly saw fit to issue preliminary injunctions against the City.

16. Consistent with the requirements of Local Rule 7.18.1(b) of this court, on December 16, 1995, at approximately 7:45 a.m., I initiated a telephone call to the Los

Angeles City Attorney's office. I spoke with someone there and asked if Deputy City Attorney Mike Klekner was in. He is the attorney whom I believed would probably handle this case for the City. I was told he would likely be in soon. I then left a message for him on his voice mail, informing him that we had filed a new federal lawsuit against the City and requesting that he call me immediately regarding certain interim relief we were going to be seeking on an urgency basis.

17. I then called that same number again at approximately 8:15 a.m., inquiring whether Mr. Klekner had yet arrived. I was then informed he was in court and would not be in till much later that morning. I then asked to speak with either his supervisor, Assistant City Attorney Claudia McGee Henry, or his associate, Deputy City Attorney Peter Nelson King, both of whom had previously represented the City specifically in civil suits challenging L.A.M.C. § 12.70C. I was told that one of them would call me back.

18. At approximately 8:40 a.m. (still on Thursday, November 16, 1995) I received a call from Assistant City Attorney Sharon Siedorf Cardenas, who informed me that she had been instructed by Ms. Henry to return my call. I then told Ms. Cardenas that we had filed a new civil rights lawsuit against the City on behalf of two adult bookstores challenging the "multiple use" prohibition of L.A.M.C. § 12.70C. I provided her with the name and number of the case. I also explained that the case had been transferred to United States District Judge Richard Gadbois under the local rule provisions regarding refiled actions. I then indicated the addresses of the plaintiffs'

businesses and explained in great detail all of the legal theories supporting our clients' claim for relief.

19. Next, I explained to Ms. Cardenas that our clients were concerned that the City may bring criminal enforcement proceedings against them at any time, even today, and, as a result, our clients were prepared to file papers immediately seeking a temporary restraining order to simply preserve the status quo until a hearing on our preliminary injunction application. However, I suggested that we would be happy if we could work out an informal agreement which would avoid the need for seeking such emergency relief. Specifically, I stated that we would not seek a TRO if the City would merely give us its informal promise not to initiate any enforcement proceedings pending a hearing on a noticed preliminary injunction motion which we would set on the hearing date of the City's choosing.

20. Ms. Cardenas responded that their civil office had no control over the police. However, she said that she was not then aware of anyone contemplating any immediate enforcement of that provision against our clients. I then suggested that we would withhold seeking the TRO if she merely promised that if the police *did* in fact issue any citations before our noticed preliminary injunction hearing, that they would be withdrawn by the City Attorney's office. She said she would look into the matter and get back to me.

21. At approximately 9:10 a.m. I received a conference call from both Ms. Cardenas and Deputy City Attorney Peter Nelson King. In that conversation, Mr. King expressed the opinion that he believed the case was not

yet ripe as no enforcement proceeding had yet been initiated. I told him what I had learned from Mr. Brown, specifically, that he, Mr. King, in a conversation on October 16th, had informed Mr. Brown that the City still considered the "multiple adult use" prohibition of L.A.M.C. § 12.70C to be fully enforceable and that he, Mr. King, had recently been approached by members of the Los Angeles Police Department seeking his approval of their initiation of criminal enforcement proceedings of this ordinance section against the Alameda Books store located at 1901 S. Alameda. Mr. King then told me: "That's all true." I then informed him that such an allegation, in my opinion, clearly established our clients' standing under Article III of the United States Constitution, *i.e.*, that the case was therefore ripe. The two city attorneys than informed me that they would look into our request further and call me back with their response.

22. At approximately 9:40 a.m., I heard back from Ms. Cardenas, informing me that the City had decided not to agree to anything and that we may as well seek the TRO. She indicated that they would want to oppose. We thereafter had a conference call with this court's chambers and a hearing on the TRO was set for Friday, November 16, 1995, at 11:00 a.m.

23. Consistent with our representations to the court, at my direction, a messenger picked up copies of all our moving papers (including a courtesy copy of the complaint) and delivered them to the offices of Ms. Cardenas by approximately noon today, Thursday, November 16, 1995.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of November, 1995, within the United States of America.

/s/ G. R. Garrou
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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California Corporation; and HIGHLAND BOOKS, INC., a California Corporation, plaintiffs, v. CITY OF LOS ANGELES, a municipal corporation, defendant.	)	Case No. CV 95-7771 RG **SECOND DECLARATION OF STEVEN WIENER IN SUPPORT OF PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION** Hrg. date: December 18, 1995 Hrg. time: 3:00 p.m. Courtroom: 16

DECLARATION OF STEVEN WIENER

FILED DEC 4 1995

(28 U.S.C. § 1746)

I, STEVEN WIENER, hereby declare as follows:

1. I am the owner of both of the plaintiff corporations in this case. I was also the owner (and continue to be the owner) of Beverly Books, Inc., throughout the time that Beverly Books, Inc., was a plaintiff in one of the seven federal cases consolidated under the name of *Topanga Press, Inc. v. City of Los Angeles*, U.S.Dt.Ct. C.D. Cal. No. CV 88-7838 RG. Specifically, Beverly Books was one of the numerous plaintiffs in the case initially entitled *New Wave, Inc., et al. v. City of Los Angeles*, U.S.Dt.Ct. C.D. Cal. No. CV 91-689 RG.

2. Alameda Books commenced operation in 1987 at 1901 S. Alameda, in the City of Los Angeles; Alameda Books, Inc. was issued a picture arcade police permit on July 7, 1987. The store closed in December of 1990 following a December 3, 1990 entry of judgment in a litigated dispute with our landlord, the Bank of America. Throughout the time that Alameda Books was then open, the only "adult" use at that store, within the meaning of the adult business definitions of Los Angeles Municipal Code ("L.A.M.C.") § 12.70B, was an "adult arcade". Although the store had retail sales of a number of "adult" retail items, the *preponderance* of the items in the store that were then offered for retail sale were not of the "adult" variety and, for that reason, the store did not operate as an "adult bookstore" as that term is defined in L.A.M.C. § 12.70B.

3. Approximately three years later, in November of 1993, Alameda Books resumed its operations at the same address, but in a location which was in a different unit of the same shopping center. That is the location where it continues to operate today. It was issued a picture arcade police permit on November 2, 1993 and, from the date of its reopening until the present, has operated as a fully "adult" store, *i.e.*, the overwhelming majority of items for retail sale in the store since that date are of the "adult" variety and the video tapes available for viewing in the store's video viewing machines are exclusively of the "adult" variety.

4. Highland Books, Inc. was issued a picture arcade police permit on January 13, 1987, and has operated as "Highland Books" under that permit ever since. Prior to June of 1991, the only "adult" type of business use at Highland Books was its picture arcade which, at all times, exhibited exclusively adult video tapes. Prior to June of 1991, the majority of the items available for retail sale at Highland Books were of a "non-adult" variety. However, in June of 1991, Highland Books converted its retail sales such that the majority of items available in the store for retail sale were in fact of the "adult" variety.

5. The 1991 change from a "single use" adult business to the manner in which Highland Books currently operates was the result of my awareness that the City, in the *Topanga Press* litigation involving numerous other businesses (including the business of Beverly Books, Inc.) had voluntarily agreed to refrain from enforcing the "multiple use" prohibition of L.A.M.C. § 12.70C pending a hearing on the plaintiffs' motion for preliminary injunction in that case. Shortly

thereafter, a preliminary injunction in fact issued. It was my belief that the City would not, thereafter, attempt to enforce that provision or, at least, that it would not do so until such time, if ever, that the preliminary injunction in that lawsuit was lifted. Given the fact that the *Topanga Press* litigation ultimately ended in a *permanent* injunction against enforcement of that portion of the municipal code, I was further of the opinion that any future enforcement efforts under that particular code section were unlikely. Similarly, when Alameda Books reopened in 1993, it operated in a similar manner for similar reasons. Of course, given the recent developments of this year, I realize now that my assessment of the City's intentions was flawed.

6. At the time of the filing of the complaint in *New Wave, Inc., et al. v. City of Los Angeles*, in January of 1991 (which was shortly thereafter consolidated with the prior *Topanga Press* case), Alameda Books, Inc. was not open for business, and Highland Books had no intention of operating in such a manner that it would fall under the City's definition of an "adult bookstore". Because the Highland Books store was not located within 500 feet of any residential zone, nor any church, school or park, Highland Books, Inc. was content to operate in this manner so as to avoid the need for expensive litigation with the City. Moreover, it was the intention of Highland Books, Inc., and later of Alameda Books, Inc. (in connection with its re-opened store) that, if the *Topanga Press* litigation proved successful, they would likely derive the benefit of that litigation and could thereafter safely allow their retail sales, as well as the video tapes they had available for viewing, to be primarily of the "adult" variety.

7. In any event, because of plaintiffs' belief in the unconstitutionality of L.A.M.C. § 12.70C, Highland Books has been openly operating in non-compliance with this "multiple use" prohibition since June of 1991 and Alameda Books has been openly operating in violation of this provision since approximately November of 1993. Until this year, there had been no attempt by the City to enforce its "multiple-use" prohibition against either of these stores.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of November, 1995, within the United States of America.

/s/ Steven Wiener
STEVEN WIENER

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California Corporation; and HIGHLAND BOOKS, INC., a California Corporation, Plaintiffs, vs. CITY OF LOS ANGELES, a municipal corporation, Defendant.	) CASE NO. CV-95-7771 RG) NOTICE OF REQUEST AND REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE; AND EXHIBITS IN OPPOSITION TO OSC RE PRELIMINARY INJUNCTION; AUTHORITY IN SUPPORT THEREOF) (**VOLUME II** OF IV)) **(Pages 66-285)**) Date: December 18, 1995) Time: 3:00 p.m.) Courtroom: 16) (Filed Dec. 13, 1995)

Dated: December 11, 1995

Respectfully submitted,

JAMES K. HAHN, City Attorney
CLAUDIA McGEE HENRY,
Sr. Assistant City Attorney
SHARON SIEDORF CARDENAS,
Assistant City Attorney
PATRICIA SHADE,
Deputy City Attorney

By /s/ Sharon Siedorf Cardenas
SHARON SIEDORF CARDENAS
Assistant City Attorney
Attorneys for Defendant
CITY OF LOS ANGELES

[SEAL]
Los Angeles City Planning Department
Room 561

CITY PLAN CASE NO. 26475
COUNCIL FILE NO. 82-0155
PUBLIC HEARING DATE: January 13, 1983

TO:	City Planning Commission
FROM:	Calvin S. Hamilton /s/ Calvin S. Hamilton ch Director of Planning
REQUESTED BY:	Planning and Environment Committee of the City Council
SUBJECT:	AMENDMENT – PROPOSED ORDINANCE TO PROHIBIT THE ESTABLISHMENT OF MORE THAN ONE ADULT ENTERTAINMENT BUSINESS AT A SINGLE LOCATION (APPENDIX A, ATTACHED).

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APPENDIX A (Proposed Ordinance)	Attached

SUMMARY AND RECOMMENDATION

The existing "Adult Entertainment Zoning" regulations prohibit the establishment of an adult entertainment business within 1,000 feet of another such business or within 500 feet of a church, school or public park. However, an ambiguity in the present language describing how such distance shall be measured has resulted in the Department of Building and Safety interpreting such provisions in a manner which permits a combination of adult businesses to be established within the exterior structural walls of a single building at one location.

In accordance with instructions of the Council's Planning and Environment Committee, the Planning Department, with the cooperation of the City Attorney, has prepared the attached proposed ordinance (Appendix A). This ordinance amends the adult entertainment zoning regulations (Section 12.70 of the Municipal Code) by expressly prohibiting the establishment of more than one adult entertainment business within the same building or portion thereof. A temporary moratorium ordinance providing for a similar prohibition has been in effect since March 16, 1982, but is due to expire on March 11, 1983.

The subject ordinance provides for a three-year amortization of nonconforming businesses (from March 10, 1982) in the case of two or more existing adult businesses located in a single building, with a maximum possible five years upon individual application in cases of economic hardship.

The ordinance appears to be in keeping with the City Council's intent of providing for the dispersion of adult

entertainment business, as now provided for in Section 12.70 of the Municipal Code.

ACTION RECOMMENDED BY THE STAFF: That the Commission –

Adopt the staff report as its report on the subject.

Find:

1. in accordance with Charter Section 96.5(5), that the subject ordinance (Appendix A, attached), is in substantial conformance with the purposes, intent and provisions of the Land Use Element of the General Plan by prohibiting, on a permanent basis, the establishment of two or more adult entertainment businesses in the same building on one site and thereby preventing the further concentration of such businesses;

2. in accordance with Charter Section 97.2(1)(a), that the subject ordinance may be indirectly related to and have a positive effect on the Land Use Element of the General Plan, specific plans and certain other plans under preparation by the Department of City Planning in that it could tend to facilitate the implementation of such plans by preventing the concentration of adult entertainment businesses at one location;

3. in accordance with Charter Section 97.2(1)(b), that the subject ordinance is in substantial conformance with the public necessity, convenience, general welfare and good zoning practice by prohibiting more than one adult entertainment business in the same building, structure or portion thereof and by providing for a reasonable amortization period applicable to existing business, which would be in keeping with existing provisions of Section 12.70 of the Municipal Code and the City Council's intent of providing for the dispersion of adult entertainment businesses.

Approve the subject ordinance and recommend that it be adopted by the City Council.

STAFF REPORT

Request

In response to a Council motion (Bernson-Stevenson-Wachs), the Planning and Environment Committee on January 26, 1982, recommended that the Planning Department and City Attorney cooperatively prepare an appropriate ordinance to prohibit more than one adult entertainment business in a single building on one site. The Committee recommended, further, that a six-month moratorium be imposed on the establishment of more than one new adult entertainment business at a single location. Such a moratorium was requested in order to allow sufficient time for study of the matter and the preparation of permanent regulations.

Subsequently, such a moratorium ordinance was prepared by the City Attorney and approved by the Commission and City Council. The ordinance was published with an urgency clause on March 16, 1982 as Ordinance No. 156,509. On August 18, 1982 the City Council, by resolution, extended the provisions of this moratorium ordinance (then due to expire on September 12, 1982) for an additional 180 days, to March 11, 1983.

As requested by the City Council, the attached proposed ordinance provides for the permanent prohibition of more than one adult entertainment business at one location.

Need to Amend Adult Entertainment Zoning Regulations

Existing regulations provide that a new adult entertainment business, as defined in Section 12.70 of the Planning and Zoning Code, shall be located at least 1,000 feet from another such business or 500 feet from a religious institution, school or public park. The Code provides that the measurement of this distance shall be in a straight line, without regard to intervening structures, from the *closest exterior structural wall* of each adult entertainment business (emphasis added).

The intent of the City Council in enacting the existing adult entertainment zoning regulations in 1978 was to provide for the dispersion of all adult entertainment business in the City. This being the case, it is quite apparent that the Council in no way intended to allow more than one such business to be established at a single location in the same building. However, the above-noted language relating to the measurement of distances specified in the ordinance has resulted in an ambiguity with respect to the number of businesses which may be permitted within the "exterior structural wall" of an establishment at one location. The Department of Building and Safety has interpreted this provision in such a manner as to permit a combination of such businesses to be located within the exterior structural walls of a single building at one site. Thus the need has arisen to enact the aforementioned interim moratorium ordinance and the subject proposed ordinance.

Description of Proposed Ordinance

The subject proposed ordinance (Appendix A, attached) would prohibit the addition of any adult entertainment business to any existing adult entertainment business or the establishment or maintenance of more than one new adult entertainment business in the same building, structure or portion thereof. Upon the recommendation of the City Attorney, an amortization provision has been included in the ordinance which would permit the continued operation of two or more adult business which existed in a single building on March 10, 1982, for a maximum period of three years after such date. (March 10, 1982 was the date the City Council adopted the aforementioned interim moratorium ordinance.)

Also, upon advice of the City Attorney, a related provision has been included in the subject ordinance to provide that in the case of two or more adult businesses operating in the same building on March 10, 1982, the business established first may be continued, but that the other businesses be discontinued by March 10, 1985. The ordinance further provides, however, that in special hardship cases a Zoning Administrator may permit more than one adult entertainment business to remain in the same building for up to five years after March 10, 1982, provided that an individual application is filed requesting such an extension (no fee to be charged) and a Zoning Administrator determines that:

(1) the adult entertainment business is subject to a written lease, entered into prior to March 10, 1982, with a termination date extending beyond March 10, 1985; or

(2) the business involves the investment of money in real property, a leasehold, improvements or stock in trade such that a longer period is necessary to prevent undue financial hardship.

The ordinance stipulates that such applications for continuation shall be filed with the Office of Zoning Administration but that no such application shall be approved if a Zoning Administrator finds that the nonconforming adult entertainment business is being maintained in violation of any provision of the Municipal Code.

Finally, the ordinance provides that the Office of Zoning Administration shall process applications for continuation in accordance with the existing procedure for appeals from Building Department Orders as set forth Section 12.27A of the Code, with appeals possible to the Board of Zoning Appeals.

Conclusion

Enactment of the subject ordinance is necessary to clarify, on a permanent basis, existing provisions of the Adult Entertainment Zoning regulations contained in Section 12.70 of the Municipal Code. It is apparent that in enacting these regulations in 1978, the City Council did not intend to permit more than one adult business in the same building at one location. Staff, therefore, recommends approval of the ordinance which will correct this inconsistency in the regulations and which contains reasonable amortization provisions applicable to existing businesses.

Environmental Impact

The subject proposed ordinance has been determined to be "generally exempt" from the requirements of the California Environmental Quality Act (CEQA) pursuant to Article III, Section I of the Los Angeles City CEQA Guidelines. Such an exemption involves projects where the type of activity in question could not possibly have a significant effect on the environment.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California Corporation; and HIGHLAND BOOKS, INC., a California Corporation, Plaintiffs, vs. CITY OF LOS ANGELES, a municipal corporation, Defendant.	CASE NO. CV-95-7771 RG NOTICE OF REQUEST AND REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE; AND EXHIBITS IN OPPOSITION TO OSC RE PRELIMINARY INJUNCTION; AUTHORITY IN SUPPORT THEREOF (**VOLUME III** OF IV) **(Pages 286-554)** Date: December 18, 1995 Time: 3:00 p.m. Courtroom: 16

Dated: December 11, 1995

Respectfully submitted,

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CITY PLAN CASE NO. 26475
Council File No. 74-4521-S.3

STUDY OF THE EFFECTS OF THE CONCENTRATION OF ADULT ENTERTAINMENT ESTABLISHMENTS IN THE CITY OF LOS ANGELES

Prepared for:

Planning Committee of
the Los Angeles City Council

Prepared by:

Los Angeles City Planning Department

June 1977

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SUMMARY AND RECOMMENDATIONS

A. Types of Ordinances to Control "Adult Entertainment" Uses

Two methods of regulating adult entertainment business via land use regulations have developed in the United States. They are: 1) the concentration of such uses in a single area of the city as in Boston; and 2) the dispersal of such uses, as in the City of Detroit. The Detroit ordinance has been challenged and upheld by the U.S. Supreme Court (*Young vs. American Mini-Theaters*, 96 S. Ct. 771, 1976).

B. Effect of "Adult Entertainment" Businesses on the Community

There has been some indication that the concentration of "adult entertainment" uses results in

increased crime and greater police enforcement problems. In the City of Los Angeles, the Los Angeles Police Department has found a link between the concentration of such businesses and increased crime in the Hollywood community. (The major portion of a Police Department report on this subject is herein contained.) While several major cities have adopted ordinances similar to the Detroit ordinance, no other major city has, to our knowledge, adopted a Boston-type ordinance.

Testimony received at two public meetings on this subject has revealed that there is serious public concern over the proliferation of adult entertainment businesses – particularly in the Hollywood area. Citizens have testified of being afraid to walk the streets; that some businesses have left the area or have modified their hours of operation; and that they are fearful of children being confronted by unsavory individuals or of being exposed to sexually explicit material. A representative of an adult theater chain testified in support of the manner in which this business was run and in support of the type of clientele which attend the theaters. The Planning Department staff is of the opinion that the degree of deleterious effects of adult entertainment businesses depend largely on the particular type of business and on how any such business is operated.

A mail survey questionnaire conducted by the Planning Department has tended to emphasize general public concern over the proliferation of sex-oriented businesses and has indicated further, that appraisers, realtors and representatives of lending institutions are generally of the opinion that concentration of adult entertainment businesses exerts a negative economic impact on both business and residential properties. They feel that the degree of negative impact

depends upon the degree of concentration and on the specific type of adult entertainment business.

The 1970-76 change in the assessed value of residential and commercial properties containing concentrations of adult entertainment businesses was compared with other areas without such concentrations, and with the City as a whole. On the basis of this comparison, it cannot be concluded that properties containing concentrations of adult entertainment businesses have *directly* influenced the assessed valuations of such properties.

Data and analysis based on the U.S. Census of 1970 and certain trend data from the censuses of 1960 and 1970 as applied to areas of the City containing concentrations of adult entertainment businesses are included in the body of the report and in the Appendix.

C. Scope of the Ordinances Enacted by Other Jurisdictions

The scope of "adult entertainment" ordinances encompasses a variety of adult activities. For example, the Los Angeles Study has considered "adult entertainment" establishments to include adult bookstores and theaters, massage parlors, nude modeling studios, adult motels, arcades, and certain similar businesses. Many other ordinances studied, however, are less broad in their coverage. The Detroit ordinance, for instance *does not* regulate massage parlors or adult motels, nor does it provide for the closing of any such businesses by amortization, which would be necessitated by the retroactive application of such an ordinance. Table I on page 11 indicates the ordinances reveiwed [sic] and the major categories of uses they regulate.

Effect of Ordinances Enacted by Other Jurisdictions: The U.S. Supreme Court in *Young vs. American Mini-Theaters* pointed out, as one of the bases for upholding the Detroit ordinance, that the regulation did not limit the number of "adult entertainment" businesses. Our study has indicated that the practical effect of literal adoption of "Detroit" language without modification in the City of Los Angeles would be to limit the potential locations for such businesses rather severely. Due to the predominance of commercial zoning in "strips" along major and secondary streets, an ordinance preventing "adult entertainment" business from locating within 500 feet of residentially zoned property would, in effect, limit such businesses to those areas of the City where there is commercial zoning of greater than 500 feet in depth. Areas with such commercial frontage would include downtown Los Angeles, a small part of Hollywood, Westwood, and Century City. A few industrial areas would also afford a separation of this distance from residential properties. The limitation of 1,000 feet between establishments (as provided in the Detroit ordinance) would likely be inappropriate in the City of Los Angeles inasmuch as commercial zoning is located in a strip pattern along most of the City's approximate 1,400 miles of major and secondary highways. (It is estimated that approximately 400 miles of such "strip" commercial zoning exists in the City.)

D. Recommendations.

1. If the City Council should find it advisable in light of the findings of this report to recommend the preparation of an ordinance to control adult entertainment businesses, such an ordinance should be of a dispersal type rather than a concentration type. (To build a planning policy basis

for such regulation, the Council may also wish the Planning Department to consider the development of appropriate policies for incorporation within the Citywide Plan.)

2. If a dispersal type ordinance is recommended by the City Council, the Planning Department is of the opinion that such an ordinance should be designed for specific application in the City of Los Angeles, rather than the direct adoption of the Detroit model. If such a dispersal-type ordinance is recommended for enactment locally, it should consider:

   a. distance requirements between adult entertainment establishments. The Planning Department recommends that a separation between establishments greater than 1,000 feet is necessary and desirable.

   b. distance requirements separating adult entertainment establishments from churches, schools, parks, and the like. The Planning Department suggests that a separation *of at least 500* feet is necessary. A similar distance separating adult entertainment uses from single-family residential development should also be considered.

   c. the possibility of enacting additional provisions to regulate signs and similar forms of advertising should also be considered.

3. If the City Council should find it advisable to recommend all of the types of "adult entertainment" businesses included in this study, it should consider whether all such uses should be in the same class and subject to the same regulations.

4. Should the City Council recommend the preparation of a zoning ordinance to regulate adult

entertainment businesses, other sections of the Municipal Code relating to the subject, including police permit requirements, should also be amended in order to be consistent with the zoning regulations and to facilitate the administration and enforcement of such regulations.

5. The Planning Department recommends that it be instructed to review existing zoning regulations applying to the C4 zone which currently prohibits "strip tease shows" and that the Zoning Administrator, through interpretation, consider expanding the list of prohibited uses in said zone to include additional adult entertainment uses as herein identified.

6. To assist in the regulation of "adult entertainment" businesses, the City should continue to vigorously enforce all existing provisions of the Municipal Code relating to the subject, including Zoning regulations.

I.

FINDINGS

1. A Boston-type ordinance (concentration) to control adult entertainment businesses would not be acceptable nor desirable in the City of Los Angeles.

2. In the event legislation is enacted in the City of Los Angeles there is adequate basis for a Detroit-type ordinance (dispersion) which requires a distance of 1000 feet between establishments and 500 feet from residential zones.

   - Existing locational patterns of adult entertainment businesses (in Hollywood, Studio City, North Hollywood) actually represent a concentration rather than a dispersion of establishments. (Such patterns are

contrary to the Detroit concept and are due, in fact, to the City's strip commercial zoning pattern.)

3. If dispersion is desired in Los Angeles, an ordinance should be designed specifically for the City. (*Direct* application of the Detroit ordinance would not be desirable or appropriate in Los Angeles and would, in part, tend to result in a concentration of such businesses.)

4. Statistics provided by the Los Angeles Police Department (LAPD) indicate a proportionally larger increase in certain crimes in Hollywood from 1965-75, as compared with the City of Los Angeles as a whole. (Hollywood has the largest concentration of adult entertainment businesses in the City.)

5. Statistics provided by the LAPD indicate that there has been a large increase in adult entertainment enterprises since 1969, particularly in Hollywood. From December 1975 to December 1976, however, there has been a decrease in such establishments.

6. Testimony obtained at two public meetings on the Adult Entertainment study conducted on April 27 and 28, 1977 indicated that:

   - Many persons, including the elderly, are afraid to walk the streets in Hollywood.

   - Concern was expressed that children are being exposed to sexually explicit materials and unsavory persons.

   - Some businesses no longer remain open in the evenings, and others have left the area allegedly directly or indirectly due to the establishment of adult entertainment businesses.

   - In Hollywood, some churches drive the elderly to services and others provide private guards in their parking lots.

- Nearly all persons opposed the concentration of adult entertainment activities.

7. Responses to questionnaires of the City Planning Department have indicated that:

   - Appraisers, realtors, lenders, etc. believe that the concentration of adult entertainment establishments has had adverse economic effects on both businesses and residential property in respect to market value, rental value and rentability/saleability; that the adverse economic effects diminish with distance but that the effects extend even beyond a 1000-foot radius; and that the effects are related to the degree of concentration and to the specific type of adult entertainment business.

   - Businessmen, residents, etc. believe that the concentration of adult entertainment establishments has adverse effects on both the quality of life and on business and property values. Among the adverse business effects cited are: difficulty in retaining and attracting customers to non- "adult entertainment" businesses; difficulty in recruiting employees; and difficulty in renting office space and keeping desirable tenants. Among the adverse effects on the quality of life cited are increased crime; the effects on children; neighborhood appearance, litter and graffiti.

8. A review of the percentage changes in the assessed value of commercial and residential property between 1970 and 1975 for the study areas containing concentrations of adult entertainment businesses have indicated that:

   - The three study areas in *Hollywood* containing such businesses have increased less than the Hollywood Community, and less than the City as a whole. Two of the three study areas in Hollywood have

increased less than their corresponding "control areas"; however, one such study area increased by a greater amount than its corresponding control area.

   - The study area in *Studio City* has increased by a greater percentage than its corresponding "control area" by a slightly lower percentage than the Sherman Oaks-Studio City Community; and by a considerably greater percentage than the entire city.

   - The study area in *North Hollywood* has increased by a considerably lower percentage than its corresponding control area, the North Hollywood Community and the City as a whole.

   - On the basis of the foregoing it cannot be concluded that adult entertainment businesses have *directly* influenced changes in the assessed value of commercial and residential properties in the areas analyzed.

9. There are various existing laws and regulations (other than zoning) available to effect proper regulation of adult entertainment businesses.

10. There is a high degree of turnover in individual adult entertainment businesses as evidenced on page 51 (Much of this change is probably due to Police enforcement.)

11. The Los Angeles City Council, both on its own initiative and at the urging of numerous citizens groups, has proposed a variety of approaches to limiting the possibly deleterious effects of "adult entertainment" business on neighborhoods.

12. At least 10 cities have adopted ordinances similar to the Detroit dispersal ordinance. Several other cities have enacted other forms of regulations.

13. The Detroit ordinance does not regulate massage parlors. Of the cities with regulations, three have included massage parlors within the purview of their zoning ordinance.

14. None of the cities surveyed call out or regulate adult motels as a part of their "adult entertainment" ordinance.

15. The Detroit Ordinance is prospective in its application and therefore does *not* include an amortization provision, i.e. provide for a time period for the removal of existing businesses. Although other such ordinances have included such provisions, none had been validated by the courts at the time of this study.

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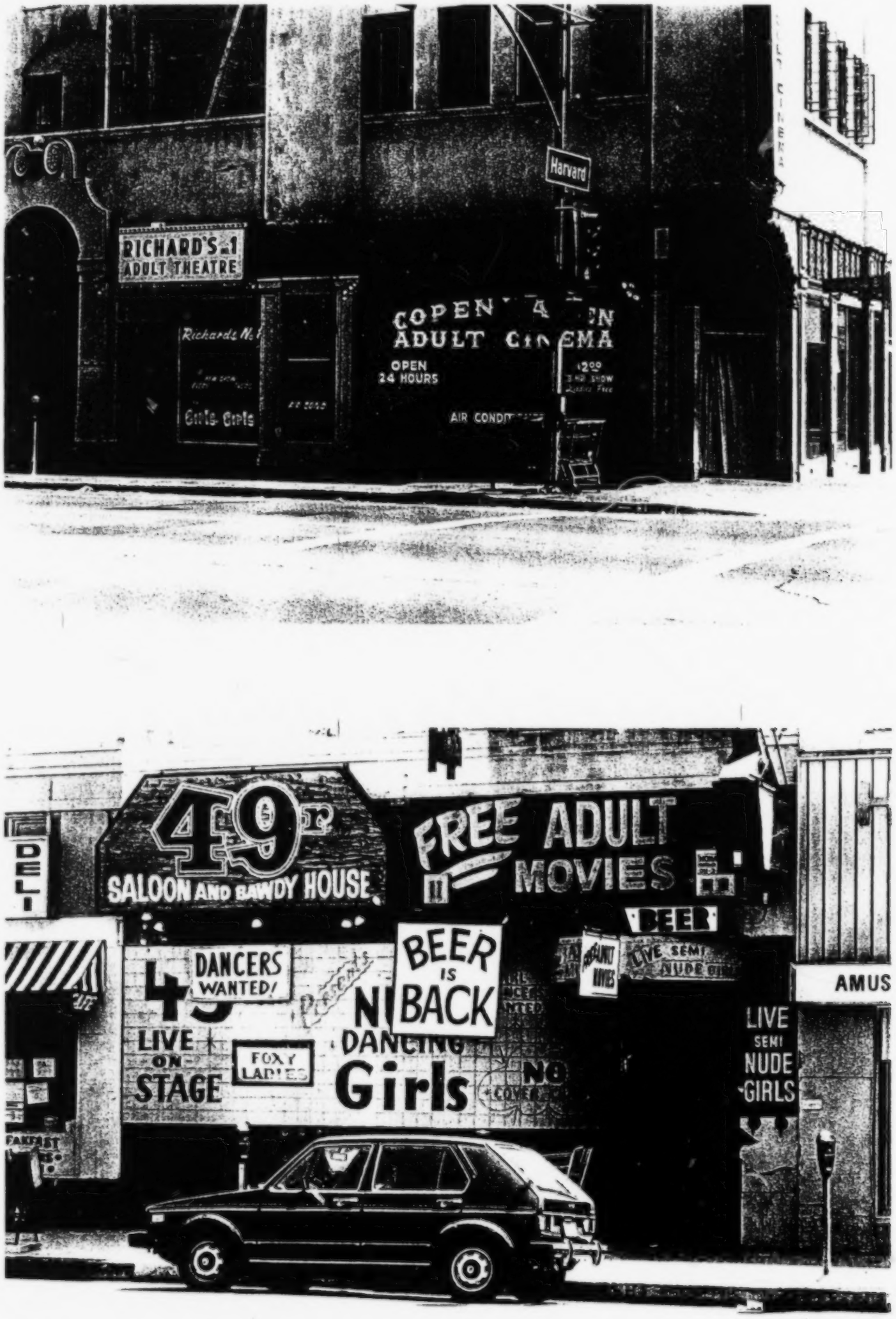
BEER
STARTS JULY

ADULT
THEATRE
OPEN 24 HRS
CINNE ARTS THEATER
AIR CONDITIONED
ADULT BOOK STORE
cinne arts
THEATRE
The Finest HARDCORE ADULT ENTERTAINMENT in Town!
LADIES FREE WITH ESCORT
3 FULL HOUR SHOWS
BOOKS
FILMS
MARITAL AIDS
MAG'S
NEW SHOW EVERY WED.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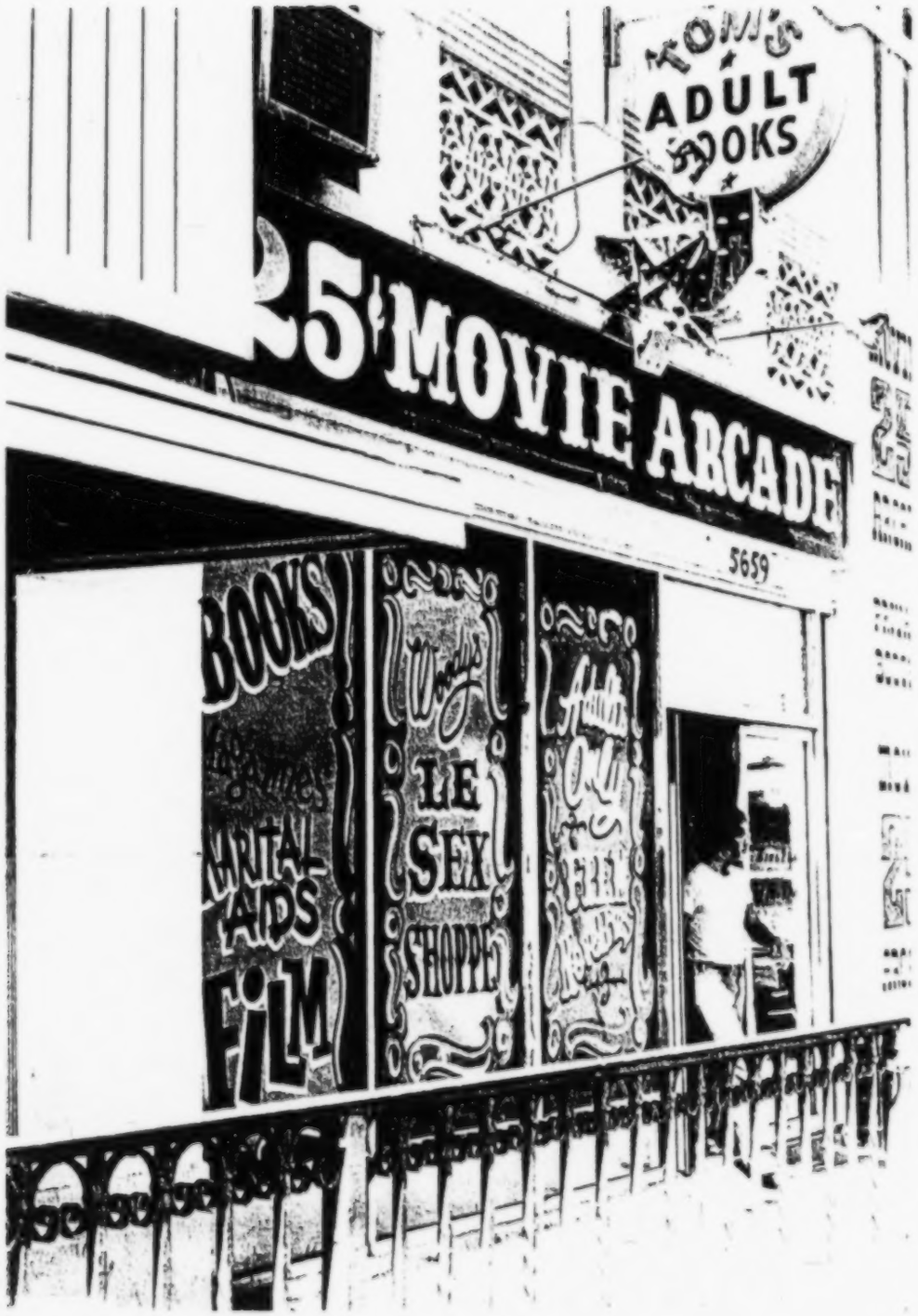
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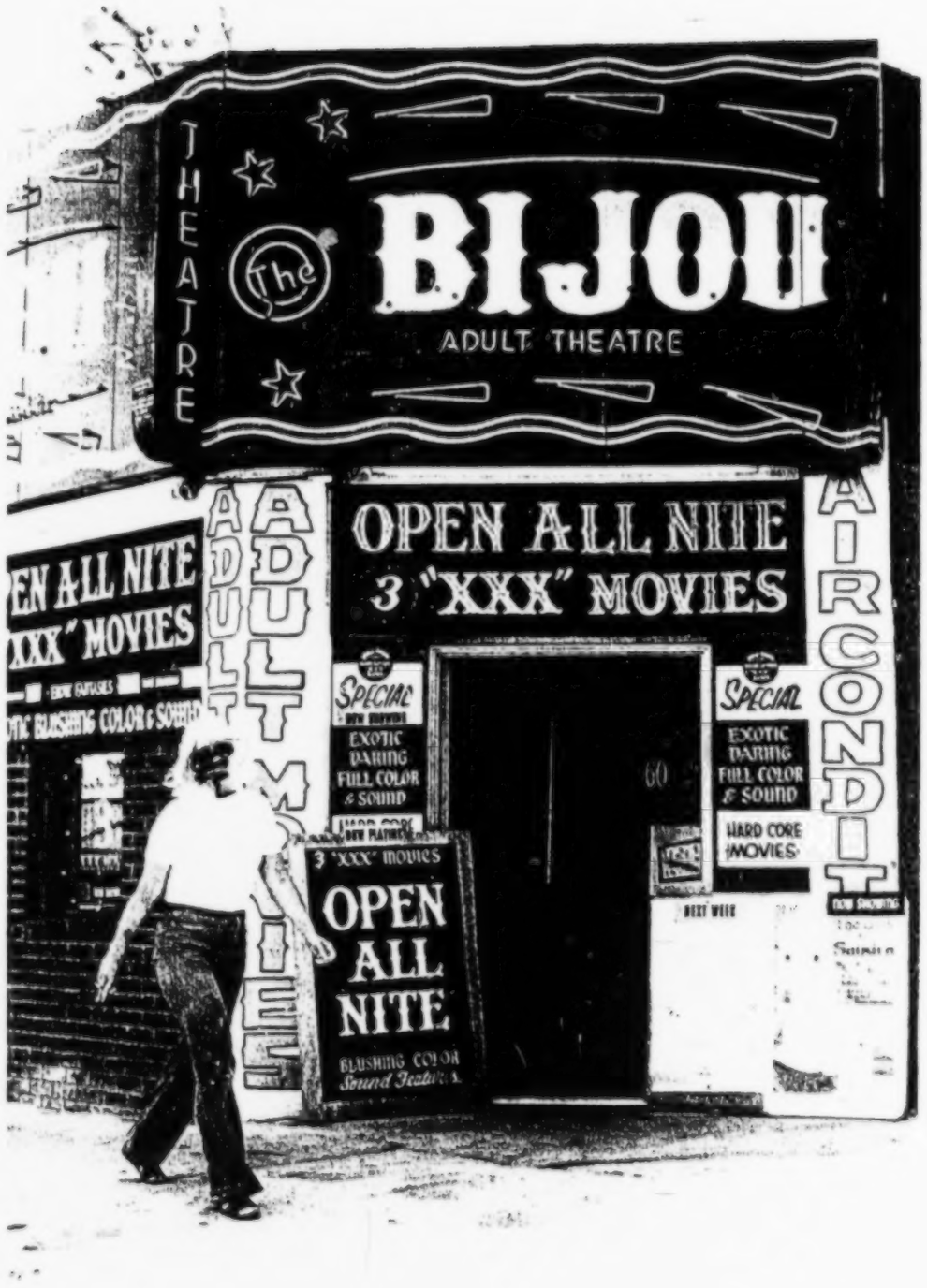
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EXOTIC DARING FULL COLOR & SOUND
HARD CORE MOVIES
3 "XXX" MOVIES
OPEN ALL NITE
BLUSHING COLOR
Sound Features
60

LIVE
ON
STAGE
EROTIC DANCERS
THE CAVE
ADULT MOVIE
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LL NEW EROTIC DANCER
DULT PLUS FOR LOVE OR MONEY
X)X A GOOD INVESTMENT

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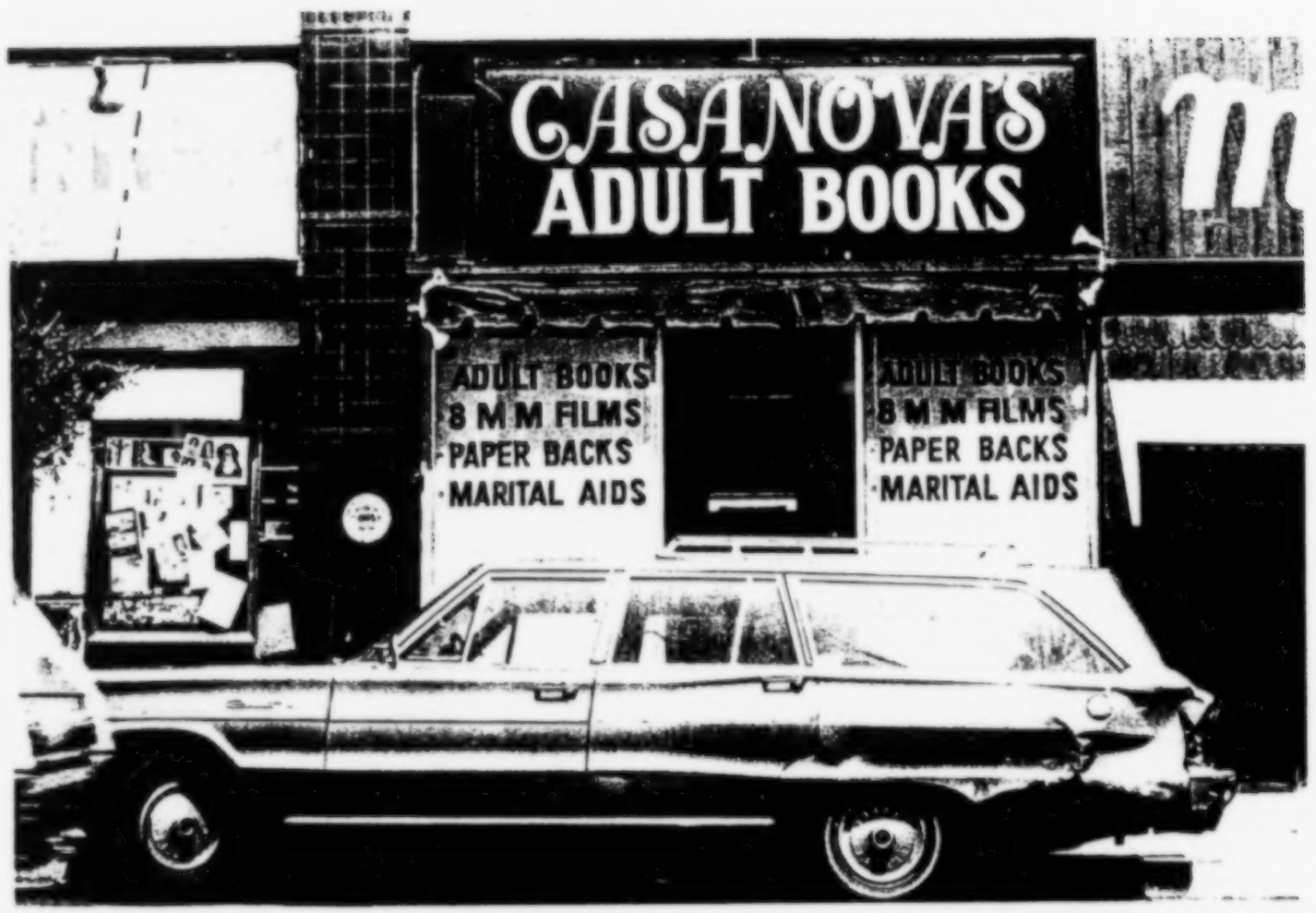
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MARITAL AIDS
ADULT BOOKS
8 M M FILMS
PAPER BACKS
MARITAL AIDS

II.

PURPOSE AND SCOPE

On January 12, 1977, the Los Angeles City Council instructed this Department, with the assistance of other City agencies, to conduct a comprehensive study to determine whether the concentration of so-called "adult entertainment" establishments has a blighting or degrading effect on nearby properties and/or neighborhoods. The term "adult entertainment" is a general term utilized by the Planning staff to collectively refer to businesses which primarily engage in the sale of material depicting sex or in providing certain sexual services. These would include the following: adult bookstores; X-rated theaters; adult motels with X-rated entertainment; massage parlors; sexual therapy establishments (other than those operated by a licensed psychologist, psychiatrist, etc.); and nude, topless or bottomless bars and restaurants.

During the past few years, there has been increasing concern in Los Angeles over the proliferation of such sexually oriented businesses. The derivation of such concern is varied – religious, moral, sociological and economic. The positions advocated by the public range from a "laissez faire" attitude to outright moral indignation and demand for prohibition.

It should be noted at this time that the topic of newsracks, was not dealt with in this study. The primary reason for not considering newsracks is that, in addition to the absence of a specific Council request for this Department to deal with that subject, this matter has been and continues to be a topic of litigation in our state courts. Additionally, other public agencies, including the

City Attorney, Bureau of Street Maintenance, and Building and Safety, are presently pursuing assignments regarding newsracks, and it is premature to determine whether newsracks could feasibly be studied as "adult entertainment" businesses, from a practical or constitutional standpoint.

In giving the Planning Department this assignment, the City Council essentially called for a fact-finding process to determine *whether* adult entertainment establishments, where they exist in concentration, cause blight and deterioration. When this question has been posed to the public, there have frequently been anguished retorts to the effect that "the answer is so obvious it is ridiculous to even ask the question," and "what is the City waiting for before it takes action to eliminate these scourges of society?"

On the other side of the spectrum, certain parties who are against the adoption of *any* regulations regarding "adult entertainment" question the legitimacy of the government's interest in the subject; and they have noted that magazines as "scurrilous" as those sold in adult bookstores are also available in the markets and drugstores where the likelihood of perusal by youngsters is obviously greater than within the confines of an adult bookstore (where no person under 18 years of age is allowed).

In completing this study, the Planning Department has made every effort to ensure a fair and unbiased analysis of "adult entertainment." The staff has been instructed to objectively review information of a factual nature; and, although the personal feelings of organized groups and the public at large were forcefully expressed at the two

public meetings and in the study questionnaires, the staff has maintained independence from such strong emotions in evaluating the data gathered.

As noted above, the staff has specifically been given the charge to determine whether the concentration of "adult entertainment" establishments has any blighting or degrading effect on the neighborhoods in which they reside. We did *not* consider the specific nature or content of the materials or services rendered, advertised or promised, for this would have constituted a censor-like role for the Department which was neither desired nor requested by the Council.

This study has focused on the Hollywood community as well as portions of Studio City and North Hollywood as those areas of Los Angeles having the greatest concentration of "adult entertainment" establishments. In order to assess the effect of the concentration of "adult entertainment" establishments in these areas, the staff has analyzed such factors as changes in assessed property values, and reviewed various crime statistics as well as other demographic and related data as available from the U.S. Census. In addition, the Department has reviewed various established approaches to the regulation of "adult entertainment" business, including legislation already enacted by other jurisdictions, and earlier efforts of the City of Los Angeles to regulate such businesses.

By means of two public meetings on the subject conducted by representatives of the City Planning Commission, and through the use of a mail survey questionnaire, the Department has also attempted to provide additional documentation relative to the actual or perceived impact

of adult entertainment businesses on the community. Current information on crime statistics has been provided in a separate report prepared by the Los Angeles Police Department, major portions of which are herein included.

III.

METHODS CURRENTLY USED TO REGULATE "ADULT ENTERTAINMENT" BUSINESSES

A. APPROACHES TO THE REGULATION OF ADULT ENTERTAINMENT BY LAND USE REGULATION

Two primary methods of regulating "adult entertainment" businesses via land use regulations have developed in the United States: the concentration approach, as evidenced by the "Combat Zone" in Boston, and the dispersal approach, initially developed by Detroit.

1. Boston Approach

In Boston the "Combat Zone" was officially established by designation of an overlay Adult Entertainment District in November of 1974. The purpose of the overlay district was to create an area in which additional special uses would be permitted in designated Commercial Zones which were not permitted in these zones on a citywide basis.

The "Combat Zone" had existed unofficially for many years in Boston, as the area in question contained a majority of the "adult entertainment" facilities in the City. The ordinance was adopted in response to concern over the spreading of such uses to neighborhoods where they were deemed to be inappropriate. Other considerations

included facilitating the policing of such activities and allowing those persons who do not care to be subjected to such businesses to avoid them.

Under the Boston ordinance, adult bookstores and "commercial entertainment businesses" are considered conditional or forbidden uses except in the Business Entertainment District. Existing "adult entertainment" businesses are permitted to continue as non-conforming uses, but, if discontinued for a period of two years, may not be re-established. Establishment of uses in areas of the city other than the "Combat Zone" requires a public hearing before the Zoning Board of Appeals.

The effectiveness and appropriateness of the Boston approach is a subject of controversy. There has been some indication that it has resulted in an increase in crime within the district and that there is an increased vacancy rate in the surrounding office buildings. Due to complaints of serious criminal incidents, law enforcement activities have been increased and a number of liquor licenses in the area have been revoked. Since the "Combat Zone" and most of the surrounding area are part of various redevelopment projects, however, the change in character of the area cannot be attributed solely to the existence of "adult entertainment" businesses.

In Los Angeles, the Police Department has investigated the effect of "adult entertainment" businesses in Hollywood and found a link between the clustering of these establishments and an increase in crime. (See Section V, pages 51 to 55). For this reason, and due to the enforcement problems created by such concentrations, the Police Department is *not* in favor of a concentration

approach in the City of Los Angeles. Public testimony at hearings and through Planning Department questionnaires has indicated an overwhelming public disapproval of this approach for the City of Los Angeles.

2. Detroit Approach

The City of Detroit has developed a contrasting approach to the control of "adult entertainment" businesses. The Detroit Ordinance attempts to *disperse* adult bookstores and theaters by providing that such uses cannot, without special permission, be located within 1000 feet of any other "regulated uses" or within 500 feet of a residentially zoned area.

This ordinance was an amendment to an existing anti-skid row ordinance which attempted to prevent further neighborhood deterioration by dispersing cabarets, motels, pawnshops, billiard halls, taxi dance halls and similar establishments rather than allowing them to concentrate.

The ordinance was immediately challenged and eventually was upheld by the United States Supreme Court. (*Young vs American Mini Theaters* 96 Supreme Ct. 771, 1976.)

In response to our request, data supplied by the City of Detroit Police Department indicates that the combination of the dispersal ordinance and a related ordinance prohibiting the promotion of pornography have been an effective tool in controlling adult businesses. To date, 18 adult bookstores and 6 adult theaters have been closed. There are 51 such businesses still in operation in Detroit and 38 pending court cases for various ordinance violations.

3. Variations Adopted by Other Cities

The success of the Detroit ordinance has spurred attempts by a number of other cities to adopt similar ordinances. The uses controlled and the types of controls established by these ordinances are summarized in Tables I and II, infra.

While the current study of the effect of "adult entertainment" businesses on neighborhoods in Los Angeles has encompassed all forms of "adult entertainment", the ordinances reviewed and the Detroit Ordinance specifically, are less encompassing in scope. Table I on the following page lists and reviews a number of ordinances, which regulate various specified adult uses.

TABLE I

Number of Zoning Ordinances Regulating Specified Adult Entertainment Uses

(11 Ordinances Reviewed – 1 not adopted)

USE	No. of Cities Regulating*
Adult Theaters	11
Adult Bookstores	9
Mini-theaters and coin operated facilities	5
Massage Parlors (includes "physical culture establishments)	
Modeling Studios/Body Painting	2
Pool/Billiard Halls	2
Topless Entertainment	2
Newsracks	1
Adult Motels	0

* (Numbers have incorporated – where appropriate – uses entitled "physical culture establishments" and "businesses to which persons under 18 could not be admitted".)

The Detroit dispersal ordinance does *not* regulate massage parlors, nor does it require any existing business to close by amortization. Many of the more recent ordinances include amortization provisions and several of these are currently in varying stages of litigation.

Perhaps the most comprehensive ordinance proposed to date (although not adopted) is that of New York City. The proposed ordinance creates five classes of controlled uses, one of which is entitled "physical culture establishments" and is defined as a general class including any establishment which offers massage or other physical contact by members of the opposite sex. The ordinance would also apply to clubs where the primary activity of such club constitutes one of the five defined classes of adult uses.

The ordinance also provides for a special permit exempting individual adult uses from amortization requirements when the Board of Standards and Appeals makes findings regarding:

1. The effect on adjacent property;

2. Distance to nearest residential district;

3. The concentration that may remain and its effect on the surrounding neighborhood;

4. That retention of the business will not interfere with any program of neighborhood preservation or renewal; or

5. In the case of an adult bookstore or motion picture theater, the Board finds that the harm created by the use is outweighed by its benefits.

Locally, the cities of Bellflower and Norwalk have enacted ordinances requiring adult bookstores and theaters to obtain a conditional use permit. As a part of their study, the City of Bellflower surveyed over 90 cities in Southern California to determine how other cities were controlling adult bookstores. Of the cities which responded to the Bellflower survey, 12 require a conditional use permit for new bookstores. The conditions for obtaining such a permit generally include dispersal and distance requirements based upon the Detroit model. Bellflower also includes parking requirements and the screening of windows to prevent a view of the interior; it prohibits the use of loudspeakers or sound equipment which can be heard from public or semi-public areas.

Other cities impose such controls as design review, prohibition of obscene material on signs and required identification of the business as "adult". Such controls are a possible alternative or addition to regulation of adult uses by location.

Exterior controls affect the aspects of adult businesses which are most offensive to some citizens. The basis for such controls stems from the recognition of privacy as a constitutional right and the right to be "left alone" as a part of that right.[1] (See *Paris Adult Theatre I v Slayton*, 93 S.Ct. 2628 1973.)

Table II, following, provides a comparison and description of ordinances from various cities which are regulating "adult entertainment" businesses by dispersal.

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[1] The theory that there should be no first amendment bar to sign controls is discussed by Charles Rembar, in "Obscenity - Forget It", Atlantic Monthly, May 1977, pgs. 37-41.

TABLE II

ORDINANCES REGULATING ADULT ENTERTAINMENT USES BY DISPERSAL

CITY	USES CONTROLLED	DISTANCE FROM RESIDENTIAL	DISTANCE FROM CHURCHES SCHOOLS	CONCEN-TRATION	AMORTI-ZATION	APPEALS PROCEDURE	OTHER CONTROLS
Seattle	Adult theaters				yes-90 days		Allow only in BM, CM, & CMT Zones; terminate such uses in all other zones
Denver	Entertainment to which persons under 18 could not be lawfully admitted	500'					
Dallas	Adult shows or theaters	1000'	1000'				
Cleveland	Adult bookstores, adult movies and mini-motion picture theaters, pool or billiard halls			1/1000'			
Detroit	Adult bookstores, adult motion picture theater, mini-motion picture theaters, cabarets, hotels, motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, taxi-dance halls	500'		2/1000'		Waiver by petition of 51% of persons owning/ residing or doing business within 500'	Ordinance prohibiting promotion of pornography

TABLE II (cont'd.)

CITY	USES CONTROLLED	DISTANCE FROM RESIDENTIAL	DISTANCE FROM CHURCHES SCHOOLS	CONCEN-TRATION	AMORTI-ZATION	APPEALS PROCEDURE	OTHER CONTROLS
New York (not adopted)	Adult bookstores, motion picture theaters, "topless" entertainment facilities, coin-operated entertainment facilities, physical culture establishments	500'		2-3/ 1000'	1 year closest to R-zone first to go	Special permit exception must make findings	.Sign regulations .Applies to clubs .Adult use always a primary use
Oakland	Adult bookstores, adult movies, peep shows, massage parlors	1000'		1/1000'	1-3 yrs. if no use permit		All require C.U. permit
Kansas City	Adult bookstores and motion picture theaters, bath houses, massage shops, modeling studios, artists-body painting studios	1000'	1000'			Waiver, if petition of 51% of persons residing or owning property within 1000' of proposed use	Confined to overlay C-X zone within C-2, 3, 4
Santa Barbara	Adult newsracks, bookstores, motion picture theaters		1000' (& from parks or recreation facilities)	1/500'			Public display of defined material prohibited
Bellflower	Adult bookstores, theaters or mini-theaters, massage parlors	1000'	1000' (& from parks or playgrounds)	1/1000'			By C.U. all building openings, entries, windows, covered or screened to prevent view into the interior
	Model studios		500'				No loud speakers or sound equip.

TABLE II (cont'd.)

CITY	USES CONTROLLED	DISTANCE FROM RESIDENTIAL	DISTANCE FROM CHURCHES SCHOOLS	CONCEN-TRATION	AMORTI-ZATION	APPEALS PROCEDURES	OTHER CONTROLS
Atlantic City	Adult motion picture theaters, mini-theater, adult bookstores	500'		2/1000'		Waiver of 500' from residential with petitions signed by 51% of parties within 500'	Requires public hearing prior to grant of permit Licensing of massage parlors no treatment of a person of the opposite sex

EXHIBIT 5
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EXHIBIT 6
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B. ALTERNATE OR SUPPLEMENTARY FORMS OF REGULATION CURRENTLY AVAILABLE UNDER STATE AND MUNICIPAL LAW

1. *Red Light Abatement Procedure*

Red light abatement is a mechanism authorized by state law which allows local government to control criminal sexual behavior by controlling the places in which such behavior occurs.

Sec. 11225 of the California Penal Code generally provides that every building or place used for illegal gambling, lewdness, assignation, or prostitution, or where such acts occur *is a nuisance* which shall be enjoined, abated, and prevented. There are three basic steps involved in the City's application of the Red Light Abatement Procedures:

(a) A complaint is filed by the City Attorney based upon the declarations of police officers of instances of prostitution taking place on the premises.

(b) The City attempts to obtain a preliminary injunction to shut down the business until completion of the scheduled trial. If the City succeeds, the premises may only be reopened as a legitimate business until the time of the trial.

(c) At the trial, the burden is on the City to prove that prohibited acts occurred on the premises. The remedy may be closure of the premises for all purposes for one year, placing the building in the custody of the court, or an order preventing the use of the premises for prostitution forever.

Complaints may be filed by citizens, and Sec. 11228 of the Code provides that in Red Light Abatement Actions "evidence of the general reputation of a place is admissible for the purpose of proving the existence of a nuisance".

This method has been used successfully by the City to abate adult entertainment establishments in Hollywood along Western Avenue. Although Red Light Abatement is directed at regulating sites, a Red Light Abatement conviction can affect the ability of an owner or operator to obtain a permit for a similar business at another site (see permit requirements supra). Due to the requirement of a court proceeding, however, this method of control is both time consuming and expensive.

2. *Police Permit Requirements*

Section 103 of the Los Angeles Municipal Code provides for the regulation and control of a variety of businesses by permits issued by the Board of Police Commissioners. Permittees are subject to such additional requirements as may be imposed by law or by the rules and regulations of the Board.

Those businesses for which the City of Los Angeles requires a police permit and which may also be oriented towards adult entertainment include:

- Arcades (Sec. 103.101)
- Bath and Massage (103.205)
- Cafe Entertainment and Shows (103.102)
- Dancing Academies, Clubs, Halls (103.105, 106, 106.1)
- Motion Picture Shows (103.108)

In some cases, the specific regulations applied to a business, if enforced, preclude adult entertainment activities as a part of, the operation of the business, with revocation of the operating permit an available remedy for violation of the regulation.

The most detailed regulations are applied to cafe entertainment (Sec. 103.102 LAMC) and are summarized as follows:

a. *Businesses Subject to the Regulations*

Operation of cafe entertainment or show for profit, and the operation of public places where food or beverages are sold or given away and cafe entertainment, shows, still or motion pictures are furnished, allowed or shown. The regulation does not apply to bands or orchestras providing music for dancing.

b. *Cafe Entertainment Defined*

"Every form of live entertainment, music solo band or orchestra, act, play, burlesque show, revue, pantomime, scene, song or dance act". The presence of any waitress, hostess, female attendant or female patron or guest attired in a costume of clothing that exposes to public view any portion of either breast at or below the areola is included with the purview of the ordinance.

c. *Summary of Activities Prohibited*

Allowing any person for compensation or not, or while acting as an entertainer or participating in any live act or demonstration to:

(1) Expose his or her genitals, pubic hair, buttocks or any portion of the female breast at or below the areola.

(2) Wear, use, or employ, or permit, procure, counsel or assist another person to wear use or employ, any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum or any portion of the female breast at or below the areola.

The above provisions do not apply to a theatrical performance in a theater, concert hall or similar establishment which is primarily devoted to theatrical performances.

The permit may also be revoked for conviction of the permittee, his employee, agent or any person associated with permittee as partner, director, officer, stockholder, associate or manager of:

(1) An offense involving the presentation, exhibition or performance of an obscene production, motion picture or play;

(2) An offense involving lewd conduct;

(3) An offense involving use of force and violence upon the person or another;

(4) An offense involving misconduct with children;

(5) An offense involving maintenance of a nuisance in connection with the same or similar business operation; or, if the permittee has allowed or permitted acts of sexual misconduct to be committed within the licensed premise.

Massage businesses have traditionally been regulated by licensing. The latest changes in the massage regulations became effective in November of 1976. The application for a permit now requires:

(1) detailed information regarding the applicant;

(2) name, address of the owner and lessor of the property upon or in which the business is to be conducted, and a copy of the lease or rental agreement;

(3) requirement of a public hearing prior to issuance of a permit for the operation of a massage business.

Operating requirements for massage businesses include:

- a permit for each massage technician;
- regulation of the hours of operation;
- posted list of available services and their cost;
- a record of each treatment, the name and address of the patron, name of employee and type of treatment administered.

So-called "private" clubs or "consenting adult clubs" which have ostensibly been formed as an alternative to massage parlors had until recently been regulated via the requirement of a social club permit. In June 1977, however, the ordinance establishing such requirement was declared unconstitutional by a Los Angeles Muncipal [sic] Court due to unreasonable restrictions on the freedom of association. To

date, it is unknown whether the City will appeal the ruling or amend the ordinance.

C. OTHER REGULATION OF ADULT ENTERTAINMENT BUSINESSES IN LOS ANGELES

Regulation of adult entertainment businesses has a long history in Los Angeles. In 1915 the "prevalence of sex evils arising out of massage parlors" caused the City Council then to enact Section 27.03 (L.A.M.C.) as "a safeguard against the deterioration of the social life of the community."[2] The ordinance provided:

> "(a) It shall be unlawful for any person to administer, for hire or reward, to any person of the opposite sex, any massage, any alcohol rub or similar treatment, any fomentation, any bath or electric or magnetic treatment, nor shall any person cause or permit in or about his place or business or in connection with his business, any agent, employee, or servant or any other person under his control or supervision, to administer any such treatment to any person of the opposite sex."[3].

This provision remained in the Code, in one form or another, until a similar Los Angles County ordinance was declared invalid in 1972 due to the preemption of the criminal aspects of sexual activity by the State.[4]

In reaching its conclusion, the court referred to the discussion of the Los Angeles City ordinance in *In Re*

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[2] *In Re Maki* 56 CA 2d. 635, 1943.

[3] Section 27.03.1 Los Angeles Municipal Code, 1938.

[4] *Lancaster v Municipal Court* 6 C 3d 805, 1972.

Maki. This 1943 case upheld the constitutional validity of the ordinance, and, according to the court, established the primary purpose of such ordinance as the limiting of criminal sexual activity.

The late 1960's and early 1970's brought a proliferation of nude bars and sexual scam joints in the Los Angeles area. In 1969, the Cafe Entertainment regulations (Section 103.102 Los Angeles Business Code) was modified to include strict controls on nudity (see discussion infra).

A variety of Council motions were made to control other types of "adult entertainment" such as arcades, massage parlors, and newsracks. Many of these were initiated due to substantial citizen complaints, and some resulted in final ordinances. (See Table III pages 19a to 19d.)

Beginning in 1974, several Council motions were made generally calling for an investigation and preparation of an ordinance regulating adult theaters and bookstores. The advice of the City Attorney was sought and at the suggestion of that Office, action was delayed pending the Supreme Court decision regarding the Detroit Ordinance. That decision was handed down in June of 1976. On July 13, 1976, a Council motion was introduced by Councilman Wilkinson requesting a study of concentrations of adult entertainment similar to that of Detroit.

Table III provides a generalized summary of the major Council files and actions relating to adult entertainment.

While not part of this study, a recently enacted ordinance controlling on-site sale of alcoholic beverages should be recognized as an attempt to control another adult-type use. Effective March 1, 1977, the Los Angeles Muncipal [sic] Code was amended to

require a conditional use permit for the on-site sale of alcoholic beverages. (Council File No. 70-200 City Plan Case No. 22878). Although aimed at the regulation of anti-social activities in all establishments serving alcoholic beverages, the subject ordinance would of course, also have a "spillover" effect with regard to those businesses which have adult entertainment as well as alcoholic beverages.

Generally, the ordinance would, in all cases, require issuance of a conditional use permit for any business selling alcoholic beverages for on-site consumption, rather than the previous practice of permitting them as a matter of right in certain zones. The advantage of the new procedure is that as a prerequisite of approval of an individual application, there must be a public hearing to determine whether the proposed use will have a detrimental effect upon nearby properties and the neighborhood in which it is being proposed. In the long run, the ordinance may prove to be an effective device to regulate uses (dispensing alcoholic beverages) which tend to have a deteriorating effect on an area, some of which may, coincidentally, also be adult entertainment businesses.

TABLE III

CITY COUNCIL FILES RELATING TO ADULT ENTERTAINMENT

DATE	FILE NO.	SPONSORS	RECOMMENDATION	DISPOSITION
3/23/70		North Hollywood Chamber of Commerce	That topless and bottomless bars and pornographic film and literature be confined to the M-3 zone.	Disapproved by the Planning Commission.
3/71	C.F. 72-374	Councilman Snyder	Effort to control bath or massage parlors by modifying the definition of "physical therapy" in state law. And, City support for legislation that would make Physical Therapists, Chiropractors responsible for activities in their offices and prohibit treatment by unlicensed assistants unless the license holder is in the room.	Introduction of AB 823 modifying the definition of physical therapy - Died in Committee November 1972.
			Recommend modification of Board of Chiropractors Rules and Regulations.	State Board of Chiropractic Examiners adopted "Board Rule 316" which makes chiropractors responsible for the conduct of employees in their place of practice, and specifically prohibits sexual acts or erotic behavior involving patients, patrons or customers.

TABLE III (cont'd.)

DATE	FILE NO.	SPONSORS	RECOMMENDATION	DISPOSITION
2/74	C.F. 72-374 S-1 S-2	Stevenson and Wilkinson	Study of the need and feasibility of regulating hours of operation, minimum requirement for practitioners - and health and safety conditions in massage parlors.	1/9/75 Board of Police Commissioners approved ordinance and adopted agreement with County to provide inspection of massage parlors.

TABLE III (cont'd.)

DATE	FILE NO.	SPONSOR	RECOMMENDATION	DISPOSITION
10/18/74	C.F. 74-4521	Snyder, Robert Stevenson, Ferraro	Provide by Ordinance that permits may not be granted to operate motion picture theaters which show "adult" films or bookstores which sell printed material which may not be sold to minors at locations which are within 1,500 feet of the nearest school, playground or church.	Police and Fire and Civil Defense Committee referred prepared ordinance to Planning Committee.
4/21/75	C.F. 74-1969		Police permit requirement for arcades becomes effective. Regulates 5 or more coin or slug operated machines. Revocation for non-compliance with health, zoning, fire requirements, obscenity convictions. Regulates hours of operation.	Regulation subsequently found unconstitutional by the Appellate Department of Superior Court, L.A. County.
1/27/76		City Planning Commission	Planning Department report to City Planning Commission, at their request, regarding proposed regulation of massage parlors and adult bookstores in Los Angeles.	No action taken.
3/9/76	C.F. 73-374 S-1A		Council adopts ordinance requiring permits to operate a massage business, act as a massage technician and gives a massage for compensation effective 4/17/76.	Ordinance now in effect.
3/23/76	C.F. 74-4521 S-2	Wilkinson and Stevenson	Require public hearings prior to opening of an adult bookstore which has for sale sexually explicit material; limit the hours of operation.	Referred to Police, Fire and Civil Defense.

TABLE III (cont'd.)

DATE	FILE NO.	SPONSOR	RECOMMENDATION	DISPOSITION
6/25/76	C.F. 74-4521	Wilkinson, Gibson, Nowell, Braude, Russell, Wachs, Stevenson, Bernardi, Farrell, Lorenzen	Request City Attorney to draft an ordinance following Young vs. American Mini Theaters guidelines.	Referred to Police, Fire and Civil Defense Committees.
6/28/76	C.F. 74-4521	Stevenson, Wachs	Preparation of zoning ordinance to prohibit sexual scam joints, adult bookstores and theaters, nude live entertainment within 500' from a private dwelling, church, school, public building, park or recreation center, of within 1000' of each other, to be retroactive, priority to the oldest establishments.	Referred to Police, Fire and Civil Defense Committees.
7/13/76	C.F. 74-4521	Wilkinson	Instruct the City Planning Department to prepare a report to the City Council regarding the extent of any possible degradation of neighborhoods in Los Angeles due to concentration of adult entertainment establishments.	Consolidation of above cases. After approval of full Council assigned to Planning Department with the cooperation of other involved agencies.
3/15/77	C.F. 74-1969		Police, Fire and Civil Defense Committee recommendation to amend Sections 103.101, 103.101.1 of the Municipal Code - (A revised ordinance to regulate arcades).	Adopted by full Council.
5/5/77	C.F. 77-860 S-49	File not available for review.	Support state legislation providing specific penalties for use of minors for pornography.	
5/11/77	C.F. 77-1997	File not available for review.	Regarding prostitution enforcement laws.	

IV.

METHODOLOGY AND ANALYSIS

Methodology

In complying with the City Council's instructions, the Department has utilized various available data sources, including property assessment data, U. S. Census data, and obtained other information germane to the subject in an effort to determine on an *empirical basis,* the effects (if any) of adult entertainment facilities on surrounding business and other properties. The Department also reviewed sales data of commercial and residential property in areas containing concentrations of adult entertainment businesses and in "control areas" containing no such concentrations. The staff also attempted to secure information on the sales volume of commercial properties, but was unable to obtain this information.

It should be emphasized that, in conducting this study, every effort was made by the Department to preclude the introduction of subjective judgment or other bias, except where the opinions of other individuals or groups were specifically solicited.* It was the Department's intent to base any conclusions entirely on relevant data and other factual information which became available during the course of conducting the study.

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* Expert opinions were requested from realtors, realty boards, appraisers and lenders through letters and questionnaires. The Department also sent letters to local members of the American Sociological Association requesting their assistance in this study. Their replies were limited in number and not significant in terms of this study.

The procedure employed by the Department in conducting this study involved the following areas of emphasis:

1. A measure of the change from 1970-76 in assessed "market value" of land and improvements for the property occupied by and within an appropriate radius of five known "clusters" (nodes) of "adult entertainment" businesses. An identical measure of four "control areas" *without concentrations* of adult entertainment businesses was also made to determine if a significant difference in the rate of change in assessment values occurred in such areas between 1970 and 1976. Comparisons were also made with the entire community in which the concentration nodes were located.

2. An analysis of responses received from a mail survey questionnaire conducted by the Planning Department;

3. Review of available data from the U.S. censuses of 1960 and 1970, including the results of a "cluster analysis" and description of Hollywood based on such analysis prepared by the City's Community Analysis Bureau;

4. An analysis of verbal and written testimony obtained at two public meetings on this subject conducted on April 27 and 28, 1977 by representatives of the City Planning Commission;

5. A review of various approaches to the regulation of "adult entertainment" businesses, including legislation enacted by other jurisdictions;

6. An analysis of alternate forms of control, including existing Municipal Code provisions relative to this general subject;

7. A discussion of earlier efforts of the City to control adult entertainment in Los Angeles; and

8. A presentation of the Los Angeles City Police Department's report dealing with crime statistics and their relation to "adult entertainment" businesses in Hollywood.

9. The actual "last sales price" of commercial and residential properties in areas containing concentrations of "adult entertainment" businesses were compared with the *assessed* values of property in such areas. The results were then compared with "control areas" containing no concentration of such businesses. (It was found that the actual sales prices tended to parallel assessed values and that in other cases the comparison was inconclusive. No further discussion of this aspect of the study is contained herein.)

10. In an attempt to determine any possible effects of "adult entertainment establishments" on business sales volume, the Department reviewed sales data from a Dun and Bradstreet computer tape file for the years 1970 and 1976. However, this source of data could not be used since it did not contain directly comparable information for the two years indicated. (A substantial change in the number of member firms listed apparently occurred after 1970.) In addition, the Department requested sales information from the City Clerk's Business License File. The City Clerk advised that the generation of the information requested would require 100 man-days of work; consequently their information could not be obtained within the time constraints for completion of the study.

Items 5, 6, and 7, above, are the subject of Section III of this report, entitled "Methods Currently Used to Regulate Adult Entertainment Business". The Police Department's

report is discussed herein as Section V. The Planning Department's analysis of topics 1 through 4 is described in detail, below.

A. CHANGES IN ASSESSED VALUATION BETWEEN 1970-76 IN FIVE SEPARATE AREAS CONTAINING HIGH CONCENTRATIONS OF ADULT ENTERTAINMENT BUSINESSES

In order to determine if there has been a significant change in assessed property values which may have been influenced by the proliferation of "adult entertainment" businesses, the Department has calculated the change in the assessed value of land and improvements for properties occupied by, and located within, a 1,000 to 1,800 foot radius of known concentrations of adult entertainment businesses. Five such areas were selected for analysis, as described below. The year 1970 was selected as the base period because of the availability of data for that year, and since that point in time corresponds approximately with the beginning of the proliferation of adult entertainment businesses in Los Angeles. The percentage change in the assessed "market" value of land and improvements for commercial and residential properties was calculated for the 1970 base year and for 1976.

Similar calculations covering the same time period were also prepared for "control areas" (containing no concentration of adult entertainment businesses) but which were similar, in terms of zoning and land use, or which were located in geographical proximity to the study area nodes. Four such control areas were selected.

1. Study and Control Areas

On the basis of field investigations and other available data, the Department determined that

there are five different areas within the City suitable for analysis, each containing a relatively high concentration of adult entertainment establishments. As shown in Exhibits "A" and "B" on the following pages, three of these concentrations (or "nodes" of activity) are located in Hollywood; one is in Studio City; and one is in North Hollywood. In each case, the focal point of the area selected for analysis was the intersection of two major streets, with the adult entertainment businesses located along the commercially zoned frontage of one or both of the streets forming the intersection. In four of the five areas selected, residentially zoned and developed properties are situated not farther than one-half block from the commercially-zoned frontage. (One node in Hollywood is entirely surrounded by commercial properties.)

EXHIBIT A

ADULT ENTERTAINMENT STUDY

BY CENSUS TRACTS

HOLLYWOOD AREA

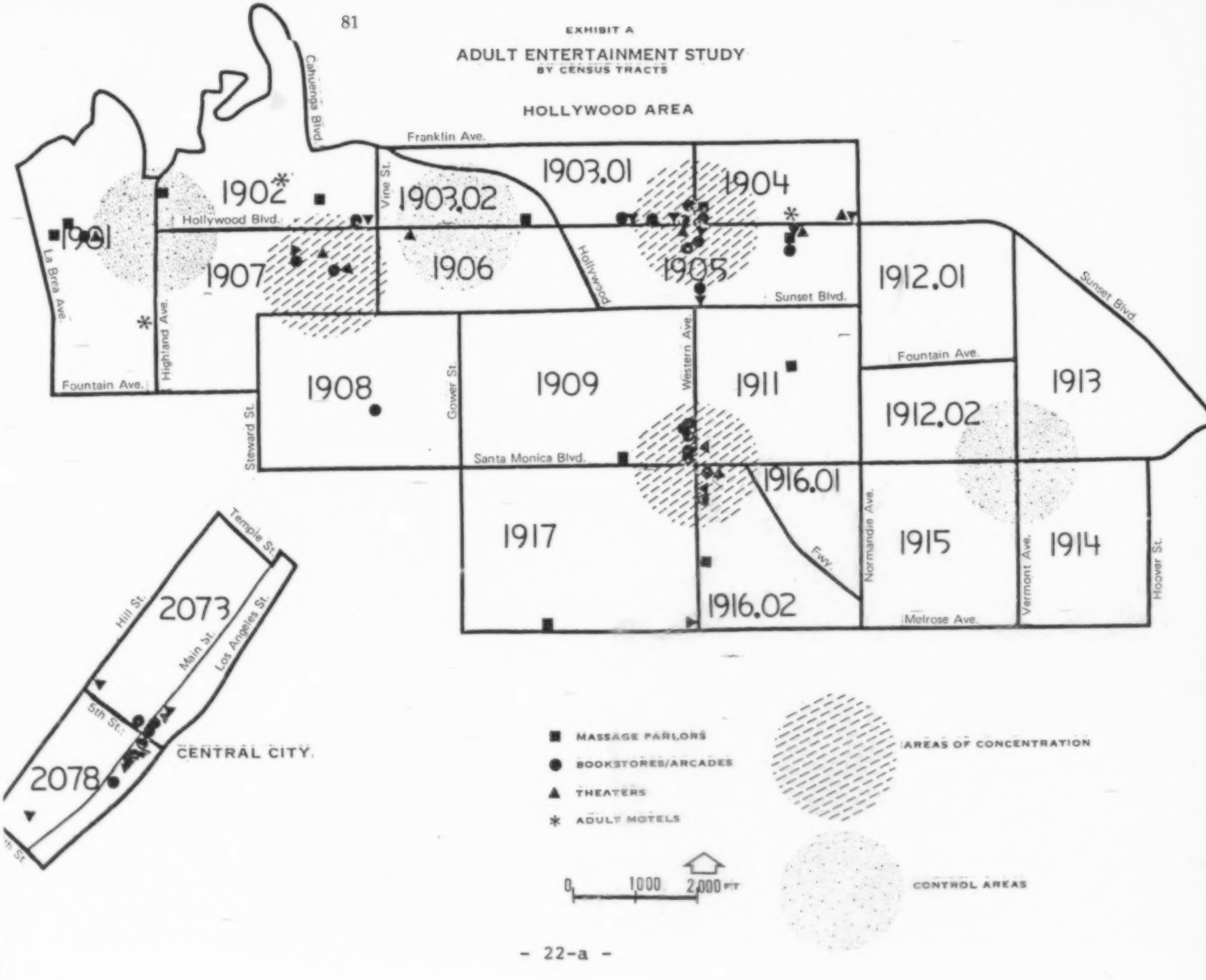
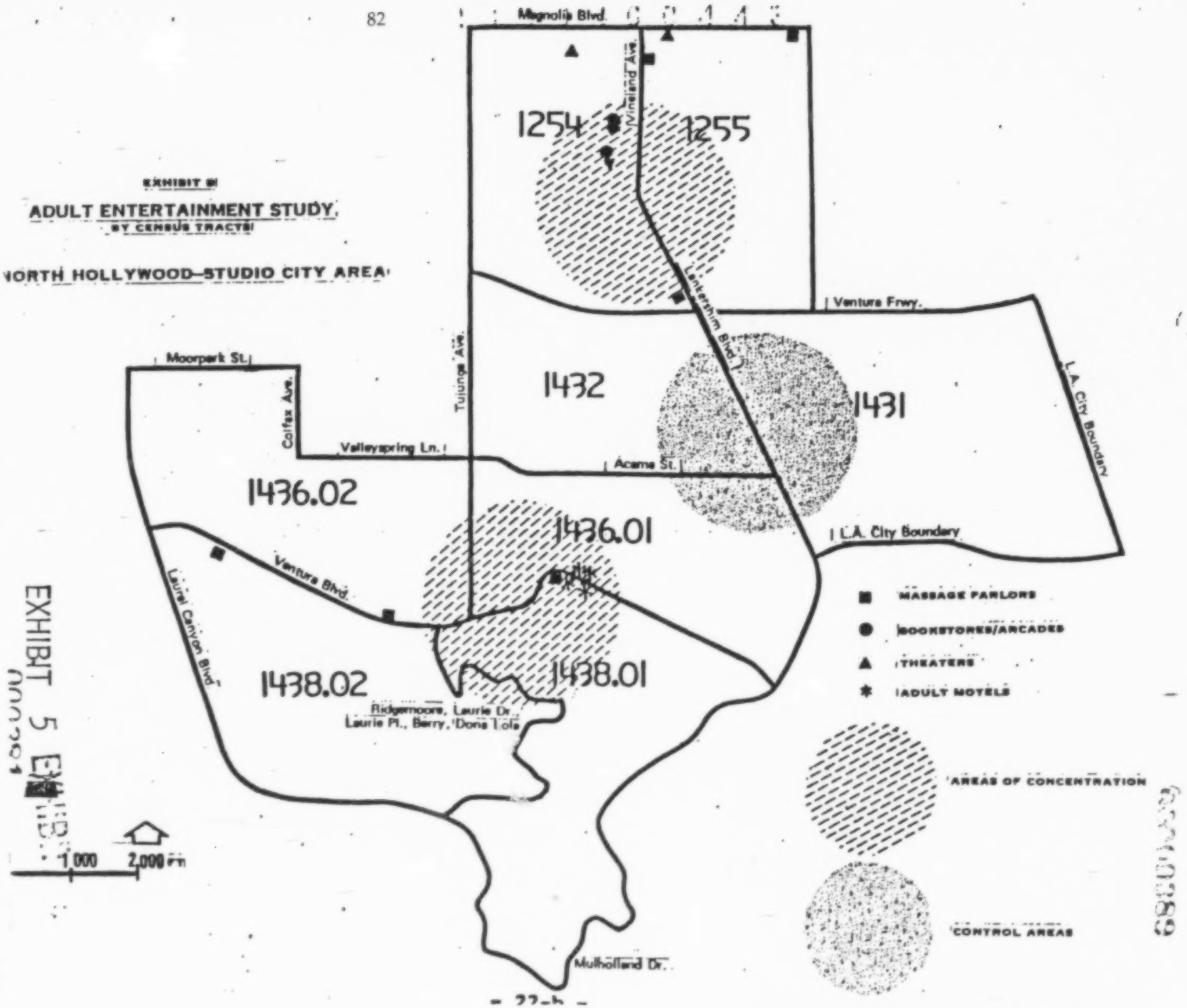


EXHIBIT 5

EXHIBIT 81

ADULT ENTERTAINMENT STUDY
BY CENSUS TRACTS

NORTH HOLLYWOOD–STUDIO CITY AREA



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Although Main Street in downtown Los Angeles contains a relatively high concentration of sex-oriented businesses (primarily theaters, arcades and bookstores), this area was not selected for analysis since no residential properties are located in proximity thereto. In addition, Main Street has traditionally contained burlesque theaters, arcades, bars and similar types of establishments, and there has been no significant change in this generalized pattern of land use during the past ten years.

In the Hollywood area, the focal points of concentration are at the following three intersections: Santa Monica Boulevard and Western Avenue (containing 12 such businesses); Hollywood Boulevard and Western Avenue (9 such businesses); and Selmna Avenue and Cahauenga Boulevard (containing 7 such businesses). In Studio City, the focal point is east of the main intersection of Tujunga Avenue and Vineland Avenue (at Eureka Drive) which contains six adult entertainment businesses; and in North Hollywood the focus of concentration is at Lankershim Boulevard and Vineland Avenue (containing 4 such businesses)

In the Hollywood area, property within an approximate 1,000-foot radius of the above named intesections was included for purposes of analysis. In Studio City it was appropriate to include those properties situated within an approximate 1,500 foot radius of the intersection of Eureka Drive; in North Hollywood, property within an approximate 1,500 foot radius of the intersection of Lankershim Boulevard and Vineland Avenue was selected for analysis.

As also shown in Exhibit "A", three separate "control areas" were established in Hollywood, each originating at the intersection of two major streets and also encompassing all property within an approximate 1,000-foot radius of the street intersection. Control areas were established at: Santa Monica Boulevard and Vermont Avenue; Hollywood Boulevard and Highland Avenue; and Hollywood Boulevard and Gower Street. In the San Fernando Valley, Exhibit "B" indicates one control area, centered at the intersection of Lankershim Boulevard and Whipple Street, and encompassing property within a radius of approximately 1,500 feet of that intesection [sic], relates to the two nodes of concentration in Studio City and North Hollywood. None of the control areas has adult entertainment businesses within its boundaries, with the exception of the area surrounding the intersection of Hollywood Boulevard and Gower Street which contains one such business.

Table IV, indicates the percentage change in assessed land and improvement value from July 1970 to July 1976 for the commercial and residential property encompassed by the applicable radius surrounding each of the five nodes of concentration, together with their corresponding control areas. For purposes of comparison, the same data is shown for the entire City and for the Community within which the study areas are located. Since concentrations of adult entertainment businesses could have a particular effect on the value of other business properties in an area, a separate tabulation is also shown for only *commercially zoned land* within each study and control area. (Table IV-A)

As indicated in Table IV, the 1970-76 percentage change in total assessed "market" valuation of commercially and residentially zoned property (land plus improvements) *increased* in all three areas in Hollywood containing concentrations of adult entertainment businesses. However, there was some variance in the magnitude of the increase. Changes in the three study area nodes were 2.79, 8.71, and 3.41 percent; compared with increases in the three corresponding control area of 12.53, 1.94, and 5.09 percent, respectively.

The study area node located at Santa Monica Boulevard and Western Avenue increased by 2.79 percent, compared with a substantially greater increase of 12.53 percent in the "control area" associated with that node. Total assessed value within the study area surrounding the intersection of Selma Avenue and Cahuenga Boulevard increased by 3.41 percent while the associated control area increased by the slightly greater amount of 5.09 percent. In direct contrast to this pattern, however, the Hollywood and Western node registered an 8.71 percent increase, while its corresponding control area increased by only 1.94 percent.

TABLE IV

1970-76 Changes in Assessed Valuation of Commercial and Residential Land and Improvements for Five Areas Containing Concentration of Adult Entertainment Businesses, as Compared With "Control" Areas, Surrounding Community, and City of Los Angeles.

Property Within Approximate 1,000 to 1,800 Foot Radius of Intersection of Streets Shown:	No. of Entertainment "Sites" 1969-70	June 1977	Percentage Change in Assessed Valuation 1970-76 Land	Improvements	Total
Santa Monica Boulevard and Western Avenue (Hollywood)	6	12	-0.22	5.81	2.79
Santa Monica Boulevard and Vermont Avenue (Hollywood Control Area)	N.A.	0	-4.84	32.66	12.53
Hollywood Boulevard and Western Avenue (Hollywood)	6	9	3.51	13.21	8.71
Hollywood Boulevard and Highland Avenue (Hollywood Control Area)	N.A.	0	19.32	-7.83	1.94
Selma Avenue and Cahuenga Boulevard (Hollywood)	4	7	21.12	-12.54	3.41
Hollywood Boulevard and Gower Street (Hollywood Control Area)	N.A.	1	17.76	-8.61	5.09
Hollywood Community	N.A.	31	21.20	32.72	27.00
City of Los Angeles	N.A.	N.A.	35.08	38.92	37.15
Tujunga Avenue and Ventura Boulevard (Studio City)	1	6	67.11	63.10	64.93
Lankershim Boulevard and Vineland Avenue (North Hollywood)	2	4	15.88	9.65	12.61

TABLE IV (cont'd.)

Property Within Approximate 1,000 to 1,800 Foot Radius of Intersection of Streets Shown:	No. of Entertainment "Sites" 1969-70	No. of Entertainment "Sites" June 1977	Percentage Change in Assessed Valuation 1970-76 Land	Improvements	Total
Lankershim Boulevard and Whipple Street (Valley Control Area)	N.A.	0	62.28	27.66	42.76
Sherman Oaks-Studio City Community	N.A.	10	69.25	60.44	64.33
North Hollywood Community	N.A.	5	28.59	33.15	31.07
City of Los Angeles	N.A.	212	35.08	38.92	37.15

TABLE IV-A

1970-76 Changes in Assessed Valuation of Commercially Zoned Land and Improvements for Five Areas Containing Concentration of Adult Entertainment Businesses as Compared With Commercially Zoned Land in "Control Areas", Surrounding Community, and City of Los Angeles.

Property Within Approximate 1,000 to 1,800 Foot Radius of Intersection of Streets Shown:	No. of Entertainment "Sites" 1969-70	June 1977	Percentage Change in Assessed Valuation 1970-76 Land	Improvements	Total
Santa Monica Boulevard and Western Avenue (Hollywood)	6	12	-0.47	8.53	3.4
Santa Monica Boulevard and Vermont Avenue (Hollywood Control Area)	N.A.	0	-12.53	4.13	-6.38
Hollywood Boulevard and Western Avenue (Hollywood)	6	9	-2.52	-0.45	-1.77
Hollywood Boulevard and Highland Avenue (Hollywood Control Area)	N.A.	0	25.01	-11.19	4.06
Selma Avenue and Cahuenga Boulevard (Hollywood)	4	7	21.93	-18.79	0.54
Hollywood Boulevard and Gower Street (Hollywood Control Area)	N.A.	0	17.07	-17.22	1.09
Hollywood Community	N.A.	31	13.43	-1.51	6.70
City of Los Angeles	N.A.	212	12.27	13.52	12.93
Tujunga Avenue and Ventura Boulevard (Studio City)	1	6	19.24	25.83	21.9
Lankershim Boulevard and Vineland Avenue (North Hollywood)	2	4	-0.76	3.91	1.92

TABLE IV-A (cont'd.)

Property Within Approximate 1,000 to 1,800 Foot Radius of Intersection of Streets Shown:	No. of Entertainment "Sites" 1969-70	No. of Entertainment "Sites" June 1977	Percentage Change in Assessed Valuation 1970-76 Land	Improvements	Total
Lankershim Boulevard and Whipple Street (Valley Control Area)	N.A.	0	82.28	-6.35	27.16
Studio City Community	N.A.	10	30.95	13.01	22.02
North Hollywood Community	N.A.	5	2.74	7.56	5.21
City of Los Angeles	N.A.	212	12.27	13.52	12.93

Sources/Notes - Tables IV and IV-A:

Actual assessment data from which percentage changes in Tables IV and IV-A were derived is shown in Appendix A. Assessment data was obtained from the City's Land Use Planning and Management System (LUPAMS) computer file. Data is as of July 1 for years shown. "Entertainment Site" means adult theatre, arcade, massage parlor, nude dancing establishment or similar use. Number of "entertainment sites" for 1969-70 was obtained from L. A. Police Department; for June 1977 from L. A. Police Department and L. A. City Planning Department. N.A. means not available. Property included within areas described is shown in Exhibits A and B.

The percentage increase in assessed values within the three study areas, *as well as the control areas,* was considerably less in each case than percentage gains registered by the Hollywood Community or the City as a whole.

In the case of the study area nodes located in the San Fernando Valley, the pattern appears to be somewhat more spurious. The study area node containing adult entertainment businesses located in Studio City (centered east of the intersection of Tujunga Avenue and Ventura Boulevard) increased by 64.93 percent – the largest increase of any of the areas analyzed. In direct contrast, the "adult entertainment node" located at Lankershim Boulevard and Vineland Avenue increased by only 12.61 percent. The one "control area" associated with these two San Fernando Valley nodes increased by 42.76 percent – a substantially greater gain than the North Hollywood node, but 22 percent less than the Studio City node. (Whether the sharp percentage increase shown for the Studio City node was the direct result of a recent reassessment cannot be readily determined.)

The increase in assessed value within the *Studio City study area* was virtually the same as that of the entire Sherman Oaks-Studio City Community but almost twice the percentage gain for commercial and residential properties in the entire City. The North Hollywood study area increased by a considerably lower percentage than the North Hollywood Community and the City as a whole.

With regard to *commercial properties considered separately,* Table IV-A reveals that the percentage

change in assessed values of land and improvements combined was generally lower in all study areas than in their corresponding control areas. One notable exception, however, is the Santa Monica Boulevard and Western Avenue node which increased by 3.4 percent while its corresponding control area (Santa Monica and Vermont) decreased by 6.38 percent. In Hollywood the change in assessed values of all study and control areas was less than in the entire Hollywood Community. In the San Fernando Valley the two study areas both increased less than the entire communities within which they are situated.

2. Conclusion – Changes in Assessed Valuation

On the basis of the foregoing, there would seem to be some basis to conclude that the assessed valuation of property within the study areas containing concentrations of adult entertainment businesses have *generally* tended to increase to lesser degree than similar areas without such concentrations. However, in the staff's opinion there would appear to be insufficient evidence to support the contention that concentrations of sex-oriented businesses have been the *primary cause* of these patterns of change in Assessed valuations between 1970 and 1976. However, responses to the Department's mail questionnaires from real estate representatives and appraisers have indicated that in their opinion, concentrations of adult entertainment businesses have, in some cases, had a direct negative impact on property values.

B. PUBLIC MEETINGS

Two public meetings were conducted by representatives of the City Planning Commission in order to

receive citizen input regarding the effects, if any, of concentrations of "adult entertainment" establishments on nearby properties and surrounding neighborhoods. Notice of the hearings was published in local newspapers, aired on radio, mailed to owners of commercial and multiple residential property within 500 ft. radius of the study areas and also to persons who had previously responded to the Department's questionnaire.

The first meeting was held in Hollywood on April 27, 1977 at Le Conte Junior High School. The second meeting was conducted in Northridge on April 28, 1977 at Northridge Junior High School. Both meetings were conducted by Planning Commission President Suzette Neiman and Planning Commissioner Daniel Garcia, with Deputy City Attorney Chris Funk also in attendance.

Questionnaires were available at the meetings for the convenience of those wishing to submit their comments in writing.

Attendance was approximately 200 persons at the Hollywood meeting and 300 persons at the Northridge meeting. A combined total of 60 persons addressed the Commission. The following is a summary of the comments received by the Commission. (Tape recordings of the hearings are available for review under City Plan Case Number 26475, in the Planning Commission Office, Room 561-K, Los Angeles, City Hall, telephone (213) 485-5071.)

The most prevalent type of comment at the Hollywood meeting was an expression of fear of walking in areas where "adult entertainment" and related business are concentrated. This concern was expressed both by parents, reluctant to allow their children to be exposed to offensive signs and wares,

and by women and elderly persons who feared walking in the areas either in the day or evening, because of the incidence of crime in the area. Specific instances of solicitation and other crimes were recited. Some proprietors testified that they felt their businesses have suffered, due to fear on the part of their customers. Other common statements concerned:

- Physical or economic deterioration of the area resulting from the influx of adult businesses.
- An increase in street crime.
- Offensive signs and displays.
- A need to use existing enforcement tools, such as "red light abatement" to control "adult entertainment" businesses.
- Representatives of La Cienaga art gallery proprietors expressed concern over the recent establishment of an adult theater in the area and its incompatibility with gallery use.

A representative of the "Pussycat Theaters" organization informed the Commission that a survey taken by the theater operators indicated that the majority of patrons were middle class, that most were registered voters, and that many were married and had college educations. It was stated that a large number of the patrons were found to reside within a few miles of their theaters. The representative of this theater chain expressed concern at the "lumping" of all adult entertainment businesses into one classification. He felt that in terms of aesthetics, clientele, and effect upon the neighborhood, the theaters were not in the same classification as some other types of adult businesses. (The Commission requested the written documentation of the survey; however, it has not been received to date.)

Several speakers at the Northridge meeting expressed concern that the City even felt it needed to request their opinion on such a subject. They felt that their displeasure over the distribution and display of pornographic materials should be obvious. Citizens also indicated how they had been responsible for the closing of certain establishments in the San Fernando Valley by picketing and other means. Some speakers indicated that they were disturbed by the availability and display of obscene material in drug stores and supermarkets.

The following is a summary listing of specific relevant comments from the two meetings:

Hollywood Meeting (April 27, 1977)

- It was alleged that organized crime is in the sex service business and that this is a $64 million local business.
- Hollywood and particularly Hollywood Boulevard was once a cultural center; now there is a different class of people. This is a degeneration of Hollywood and Hollywood Boulevard.
- In Hollywood, due to fear for safety, people walk around in groups, not alone or as couples.
- Zoning is not the ultimate response to obscenity: there are public nuisance laws, red light abatement statutes, etc.
- There was concern about the effects on children; parents in Hollywood indicated that they did not allow their children to walk unescorted: there are too many muggings and attacks.
- There are problems brought on by the changing population of the area: street fights, acts of mischief and minor property damages have resulted.

- Several persons indicated that they had not walked in the area for years due to muggings, solicitations, etc.
- The City should make greater use of the Red Light Abatement Law.
- A homeowners' association representative talked of being accosted by a girl on Hollywood Boulevard; that crime was a "fall-out" of adult entertainment; and that this was a mecca for crimes, such as burglary, muggings, thefts, and the like.
- Some persons were personally offended, and stated that the sex businesses have affected residents economically and aesthetically.
- Art Dealers (fine art dealers; antique businesses operators; proprietors of legitimate book stores) on La Cienaga Boulevard were concerned over the proliferation of adult entertainment businesses; there are vacant stores in this area that they fear may go into use for adult entertainment business. They are concerned that La Cienega will no longer be a cultural center.
- Representatives of the Screen Actor's Guild and Actor's Equity indicated they had demonstrated against an adult bookstore and appealed to the entertainment industry to help with this problem.
- A representative of the Hollywood Chamber of Commerce indicated there had been 60 or 70 surveys of the area, but lack of City support. He said the City should modify its C4 Zone regulations and eliminate movie arcades.
- A Studio City realtor indicated he had sent 11,000 replicas of the Planning Department's questionnaires (under his letterhead) to residents of Studio City. He indicated there were 6 adult motels

near Universal Studios and that more were coming.

- A former non-adult material bookstore owner in Hollywood (past tenant of location picketed on April 26, 1977) indicated that when his building was sold, his rent doubled; that other tenants got three day notices (to move out), that everybody was getting out – he claimed something was going on in that block. He also indicated that radio station KFWB had moved from the area.
- It was indicated that KFWB moved because women employees were afraid. It was also stated that a restaurant in that building went out of business.
- A local minister indicated concern for the elderly, and that children from 4 to 7 years old cannot ride their bikes without being accosted; he also indicated there had been 23 arrests for prostitution near a local elementary school; he further stated that residents have to go to other areas to shop.
- A representative of a local synagogue stated that the elderly were afraid to walk to religious services and that car pooling had been established.
- A representative of the Hollywood Businessmen's Association advised that 50 percent of the sex crimes reported (in the City) were in the Hollywood area; that since the Police have closed some sex establishments crime has dropped; that adult entertainment businesses have contributed to a deteriorating condition in Hollywood; that there is a 100 percent turnover in school attendance; that the business license ordinance should be modified to require an environmental impact

report and proper sign controls for new establishments and that notice should be given to persons within one-half mile; he also reiterated that traditional businesses were leaving the area.

- It was indicated that property values had gone down; Vine and Selma was valued at $12.50 per sq. ft. years ago, but recently it was worth only $8.50 per sq. ft.

Northridge Meeting (April 28, 1977)

- A representative of the North Hollywood Chamber of Commerce indicated that adult entertainment businesses were an economic and social blight; that the Police Commission was no help; that they had proposed the M3 Zone for these uses; that we need more police and should make greater use of red light abatement; that the Alcoholic Beverage Control Department should do more.
- Claims were made that the Pussycat Theater in North Hollywood was a dangerous environment to women and children; that in the recent past 2 teenage girls had been accosted and a woman had been attacked and had to jump from a car.
- A beauty shop owner near a Pussycat Theater indicated she no longer stayed open in the evening because her customers were afraid.
- Adult entertainment businesses should be required to rent space in "Class A" buildings.
- Various persons objected to newsracks, obscene material, problems of congestion and ingress and egress.
- The *Miller vs. California* court case was discussed: it was contended that this case established that "a community can set its own standards".

- Questions were posed as to whether economic and financial impact should be facts needed to develop an ordinance to control adult entertainment.
- Claims were made that adult entertainment business bring crimes and violence to the area.
- A speaker stated that both the Boston and the Detroit ordinances are unacceptable. "You cannot control pornography by zoning", and opposition to the zoning approach to obscenity was expressed.
- "California is the pornographic capital of the world."
- People are offended by pornographic material in department stores, drug stores, supermarkets, etc. The recent Los Angeles County newsrack ordinance was discussed.
- One person posed the question "why don't we have an Environmental Impact Report for pornographic businesses?"
- Church representatives and a teacher at the Christian School were concerned about their members and children being exposed to pornographic advertising displayed at the Lankershim Theater and Pussycat Theater. They are afraid to let their children out on the streets.
- It was stated that "we should use civil, public nuisance and red light abatement to control adult entertainment businesses."

Conclusion

In summary, the overwhelming majority of speakers felt that the concentration of "adult entertainment" businesses in their neighborhood was detrimental,

either physically by creating blight or economically by decreasing patronage of traditional businesses; or socially by attracting crime. As a result of increased crime, nearby residents have become fearful and have been forced to constrain their customary living habits in the community.

Although the testimony obtained at the public hearings would from a subjective point of view, substantiate the conclusion that "adult entertainment" businesses have a deleterious effect on the surrounding community, the staff is of the opinion that legitimate questions may have been posed by the Pussycat Theater representative regarding a single classification for all "adult entertainment" uses. There would appear to be some basis to support the contention that certain types of such uses are more "objectionable" than others, and that negative effects of a particular type of business might be minimized, depending on how the business is operated and advertised.

C SURVEY QUESTIONNAIRE CONDUCTED BY DEPARTMENT OF CITY PLANNING

1. Description of Survey

In order to determine additional factual data relating to the subject and to seek the comments and opinions of property owners, businessmen, realtors, real estate boards, real estate appraisers, representatives of banks, Chambers of Commerce, and others, the Department conducted a mail survey. Two questionnaires were developed. One was designed primarily for businessmen and residential property owners and is hereinafter referred to as the General Questionnaire. The second was designed for realtors, real estate appraisers and lenders and is hereinafter referred to as the Appraiser Questionnaire. A copy of the

two questionnaires is contained in the Appendix. The completed questionnaires, together with other letters relative to this subject, are on file in Room 510, Los Angeles City Hall.

The General Questionnaire was mailed to all property owners (of other than property in single-family use) within a 500-foot radius of each of the five study areas. The questionnaire was also distributed to various community groups (including local and area Chambers of Commerce) and at the public meeting in Hollywood and in Northridge.

The Appraiser Questionnaire was mailed to all members of the American Institute of Real Estate Appraisers having a Los Angeles City address and to members of the California Association of Realtors whose office is located in the vicinity of the study areas.

Each of the two questionnaires contained spaces for a respondent to check answers to a series of questions relating to the overall effect (if any) of adult entertainment establishments on nearby properties. It should be emphasized that the Department intentionally structured the "objective response" portion of the questionnaires so as to reduce "bias" and to solicit the maximum range of responses to any specific question. For example, a respondent could check "positive", "negative" or "no effect" in response to the question . . . "What overall effect do you feel that adult entertainment establishments have on a neighborhood?"

In addition to the direct response portion of the questionnaire, information of a more subjective nature was also solicited. For example, after each question, space was provided for a respondent to

list any comments or examples which might pertain to a specific question. The beginning of each questionnaire also invited the respondent to write comments in the space provided or on a separate sheet.

Between February 10 and April 30, 1977, a total of approximately 4,000 questionnaires were mailed (with return envelopes provided) or otherwise distributed to businessmen, real estate appraisers, realtors, representatives of banks and savings and loan institutions, the owners of multiple-unit residential property, and others. Of this number, 694 questionnaires were completed and returned to the Department (an overall 17.4 percent rate of return).

In addition, the Department received 197 non-solicited completed questionnaires from property owners in Studio City. These questionnaires were distributed in a private mailing by a private individual. The subject mailing included a replica of the Department's appraiser questionnaire, together with written material alleging City intent to create an adult entertainment zone in Studio City (copy included as Appendix D-2). According to the subject individual's testimony at the public hearing on April 27, 1977, 11,000 replica questionnaires were mailed. Due to the prejudicial nature of the mailing, these questionnaires are not included in the study. However, the staff did tabulate the subject responses and the tabulation and summary are included in Appendix D-3. All persons responding to the above mailing were sent a memo from the Department correcting the misinformation (copy included in Appendix D-1).

2. Results of Survey Questionnaires

A tabulation of the responses to the specific questions solicited in the objective portion in each of the two types of questionnaries [sic] is presented below. A summary of the comments follows:

GENERAL QUESTIONNAIRE

- RESPONSES -

Total no. of responses / Total no. of questionnaires = 581/3600 = 16% return

Question

1. What overall effect do you feel that adult entertainment establishments have had on a neighborhood:

	Positive	Negative	No effect
Effect on the business condition (sales & profits) in the area:	43(7.4%)	492(84.7%)	36(6.2%)
Effect on homes (value & appearance) in the area immediately adjecent to adult entertainment businesses:	37(6.9%)	472(81.2%)	26(4.5%)

	Positive	Negative	No effect
Effect on homes (value & appearance) in the area located 500 feet or more from adult entertainment businesses?	35(6.0%)	446(76.8%)	19(3.3%)

2. Do you believe the establishment of adult entertainment facilities in the vicinity of your business has had any of the following effects? (Please check all those effects which you feel have occurred.)

- 26 (4.5%) no effect
- 206 (35.5%) lower rents
- 275 (47.3%) vacant businesses
- 288 (49.6%) tenants moving out
- 224 (38.6%) complaints from customers
- 3 (-) less crime
- 370 (63.7%) more crime
- 1 (-) improved neighborhood appearance
- 416 (71.6%) deteriorated neighborhood appearance
- 8 (1.4%) other (please specify)
- 305 (52.5%) decreased property values
- 13 (2.2%) increased property values
- 16 (2.8%) lower taxes
- 98 (16.9%) higher taxes
- 489 (84.2%) decreased business activity
- 8 (1.4%) increased business
- 312 (53.7%) more litter

3. (Not applicable for tally.)

4. Have you seriously considered moving your business elsewhere because of nearby concentrations of adult entertainment businesses?

167 (28.7%) Yes 165 (28.4%) No

5. Would you consider expanding in your current location?

83 (14.3%) Yes 177 (30.5%) No

6. What types of adult entertainment establishments are there in your area (Please check appropriate boxes.)

- 410 (70.6%) adult bookstores
- 310 (53.4%) massage parlors
- 190 (32.7%) peep shows
- 237 (40.8%) bars with X-rated entertainment
- 3 other sex shops
- 179 (30.8%) nude or topless dancing
- 389 (67.0%) adult theatres
- 240 (41.3%) adult motels

How far from your business is the nearest adult entertainment establishment? (Not tabulated due to limited response.)

Responses to the foregoing questions reveal that adult entertainment businesses are perceived by the majority of respondents as exerting a negative impact on surrounding businesses and residential properties.

Whether or not such negative impacts have *actually occurred*, or only perceived to have occurred, cannot be readily determined, empirically, on the basis of this survey. However, in terms of the *attitudes* of the respondents toward such businesses, the conclusion must be drawn that the overall effect on surrounding properties is considered to be negative.

Among the adverse effects of adult entertainment establishments cited by businessmen are:

- Difficulty in renting office space
- Difficulty in keeping desirable tenants
- Difficulty in recruiting employees
- Limits hours of operation (evening hours)
- Deters patronage from women and families; general reduced patronage

Of those businessmen indicating that they have not seriously considered moving because of nearby concentrations of adult entertainment business, the most frequent response was that they had been in the area a great many years, and to establish elsewhere would be too risky and/or that their investment was too great to move. A few respondents indicated that it is the adult entertainment businesses that should move, not they.

The few businessmen commenting that they would not consider expanding in their current location indicated that their business did not warrant expansion.

Several businessmen indicated that their businesses are relatively unaffected by nearly [sic] adult entertainment establishments. Among the businesses cited are a commercial art studio; a building trades contractor; a mail order business; a telephone answering service and a wholesaler.

Among the few positive effects cited by businessmen is the increase in business for certain non-adult entertainment businesses such as tourist-serving businesses (e.g. car rental agencies). "The bad effect it might have is cancelled out by the business it does attract; x-rated theaters attract tourists."

Many respondents commented on the crimes associated with adult entertainment establishments: prostitution, dope, theft, robbery, etc. A high percentage of respondents report they do not feel safe in such areas.

A high percentage of respondents commented on their concern for the effects of adult entertainment environment on the morals and safety of children.

A high percentage of respondents commented on the aesthetics of adult entertainment establishments: garish, sleazy; shabby, blighted, tasteless, etc. Also, many commented on the increased incidence of litter and graffiti.

APPRAISER QUESTIONNAIRE

- RESPONSES -

$$\frac{\text{Total no. of responses}}{\text{Total no. of questionnaires}} = \frac{81}{400} = 20\% \text{ return}$$

Question	Response		
1. What effect does the concentration of adult entertainment establishments have on the market value of business property (land, structures, fixtures, etc.) located in the vicinity of such establishments?	increase in value	1	(-)
	decrease in value	71	(87.7%)
	no effect	5	(6.2%)
2. What effect does the concentration of adult entertainment establishments have on the rental value of business property located in the vicinity of such establishments?	increase in value	1	(-)
	decrease in value	55	(67.9%)
	no effect	4	(4.9%)
3. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of business property located in the vicinity (length of time required to rent or sell property; rate of lessee/buyer turnover; conditions of sale or lease, etc.)?	increase in rentability/saleability	3	(3.7%)
	decrease in rentability/saleability	48	(59.3%)
	no effect	3	(3.7%)
4. What effect does the concentration of adult entertainment establishments have on the annual income of businesses located in the vicinity of such establishments?	increased income	2	(2.5%)
	decreased income	59	(72.8%)
	no effect	7	(8.6%)
5. Have any business owners or proprietors considered relocating or not expanding their businesses because of the nearby concentration of adult entertainment establishments?	yes	23	(28.4%)
	no	4	(4.9%)
	not known	28	(34.6%)
6. In recent years, has the commercial vitality (sales, profits, etc.) of any area in the City of Los Angeles been affected in any way by the nearby concentration of adult entertainment establishments?	yes	45	(55.6%)
	no	29	(35.8%)
	not known	-	

7. What effect does the concentration of adult entertainment establishments have on the market value of private residences located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	2 (3.8%)	48 (90.6%)	3 (5.7%)	53
500 - 1000 feet	2 (3.6%)	51 (91.1%)	3 (5.4%)	56
More than 1000 feet	1 (3%)	29 (87.9%)	3 (9.1%)	33

8. What effect does the concentration of adult entertainment establishments have on the rental value of residential income property located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	2 (3.4%)	51 (87.9%)	5 (8.6%)	58
500 - 1000 feet	1 (2.6%)	33 (86.8%)	4 (10.5%)	38
More than 1000 feet	1 (2.8%)	27 (75%)	8 (22.2%)	36

9. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of residential property located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	1 (2.5%)	37 (92.5%)	2 (5%)	40
500 - 1000 feet	1 (2.6%)	35 (89.7%)	3 (7.7%)	39
More than 1000 feet	1 (2.8%)	28 (77.8%)	7 (19.1%)	36

10. In regard to the questions setforth above, please describe the effects which you believe the concentration of adult entertainment business has on each of the following:

Property values of surrounding:

	Decrease	Unknown	No effect	Increase
Commercial property	46 (56.8%)	32 (39.5%)	1	2 (2.5%)
Residential property	42 (51.9%)	38 (46.9%)	-	1
General	16 (19.8%)	65 (80.2%)	-	-

Rental values of surrounding:	Decrease	No response	No effect	Increase
Commercial property	39 (48.1%)	42 (51.9%)	-	-
Residential property	37 (45.7%)	44 (54.3%)	-	-
General	12 (14.8%)	69 (85.2%)	-	-
Vacancies				
Number	1	56 (69.1%)	1	23 (28.4%)
Length	1	72 (88.9%)	2 (2.5%)	6 (7.4%)
Rate of tenant turnover	-	49 (60.5%)	1	31 (38.3%)
Annual business income	24(29.6%)	53 (65.4%)	2 (2.5%)	2 (2.5%)
Complaints from customers and residents due to concentration Yes	24(29.6%)	57 (70.4%)		
Neighborhood appearance	24(29.6%)		3 (3.7%)	
Crime	1	1	-	48 (59.3%)
Litter	-	1	1	44 (54.3%)
Other (please specify)				

Several respondents commented that the adverse effects are related to the *degree* of concentration and that one free-standing business may have no effect; also, that the effect is related to the *type* of adult entertainment business (unspecified).

A few respondents indicated that the property value and dollar business volume for any given property would increase for businesses compatible with adult entertainment businesses, e.g. other adult entertainment businesses, bars, etc.

A very high percentage of appraisers and realtors commented on the adverse effects of the subject businesses on neighborhood appearance, litter and graffiti.

GENERAL QUESTIONNAIRE

- REALTOR RESPONSES -

Total no. of responses = 32

NOTE: Due to distribution, certain realtors received the General Questionnaire rather than the Appraiser Questionnaire. For analysis purposes, the subject responses were tabulated separately and analyzed together with the responses to the Appraiser Questionnaire.

Question

1. What overall effect do you feel that adult entertainment establishments have had on a neighborhood:

	Positive	Negative	No effect
Effect on the business condition (sales & profits) in the area:	-	31 (97%)	1
Effect on homes (value & appearance) in the area immediately adjacent to adult entertainment businesses:	-	31 (97%)	1
Effect on homes (value & appearance) in the area located 500 feet or more from adult entertainment businesses:	-	29 (91%)	2

2. Do you believe the establishment of adult entertainment facilities in the vicinity of your business has had any of the following effects? (Please check all those effects which you feel have occurred.)

1 (31.3%)	no effect	29 (91%)	decreased property values
23 (71.9%)	lower rents		
25 (70%)	vacant businesses	0	increased property values
25 (70%)	tenants moving out	3 (9.4%)	lower taxes
25 (70%)	complaints from customers	7 (21.9%)	higher taxes
0	less crime	23 (91%)	decreased business activity
26 (81.3%)	more crime	0	increased business

30 (94%) deteriorated neighborhood appearance

27 (84%) more litter

___ Other (please specify)

3. (Not applicable for tally.)

4. Have you seriously considered moving your business elsewhere because of nearby concentrations of adult entertainment businesses?

10 (31.3%) Yes 15 (46.9%) No

5. Would you consider expanding in your current location?

10 (31.3%) Yes 12 (37.5%) No

6. What types of adult entertainment establishments are there in your area? (Please check appropriate boxes.)

27 (84.4%) adult bookstores

17 (53.1%) massage parlors

15 (46.9%) peep shows

12 (37.5%) bars with X-rated entertainment

13 (40.6%) nude or topless dancing

24 (75%) adult theatres

15 (46.9%) adult motels

How far from your business is the nearest adult entertainment establishment?

(Not tabulated due to limited response.)

D. U.S. CENSUS AND RELATED DATA

1. Cluster Analysis "Used by Community Analysis Bureau to Describe Various Parts of the City"

The last U.S. Decennial Census was conducted on April 1, 1970. With the proliferation of adult entertainment business it would seem appropriate to include as background information a description of the socio-economic and physical characteristics of the areas under study, as revealed by census data. Such a description may provide insight as to the underlying factors contributing to the concentration of sex-oriented business in the areas under study.

An excellent available source providing such a description is a 1974 report prepared by the City's Community Analysis Bureau (CAB) concerning the "State of the City".* In this document, the CAB has utilized a statistical technique known as "cluster analysis" to identify specific areas within the City which have common characteristics, as revealed by census data. In conducting this study, the CAB made use of 66 census data items (or variables) which were selected from the entire spectrum of socio-economic and physically descriptive data items available for all census tracts in the City.

The U.S. Census Bureau reports data on numerous geographical levels, the "census tract" being the smallest geographical area for which data is maintained and reported on a regular basis. There are 750 such census tract areas in the City, each containing a population of slightly

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* *The State of the City – A Cluster Analysis of Los Angeles* – City of Los Angeles Community Analysis Bureau, June 1974.

fewer than 4,000 persons, on the average. The five study area nodes and four control areas under study herein are contained within portions of 25 census tracts.

The particular variables which most accurately describe a particular census tract were used by the Community Analysis Bureau in such a manner as to combine those areas which have the most similar characteristics. As a result of this procedure, thirty cluster groups were established throughout the City, each such cluster consisting of one or more census tracts, each census tract within a particular cluster being more similar to other parts of that cluster than to any other geographical section of the City.

Description of Hollywood Area

The three study areas in Hollywood containing concentrations of adult entertainment businesses are included within portions of 11 census tracts. Their three associated "control areas" are partially contained within nine census tracts. These 20 tracts are all included within a larger area identified in the CAB's report as "Cluster 15", entitled "The Apartment Dwellers", consisting of 34 tracts. A description of this area, as quoted from the previously cited CAB report, is set forth below. The fact that this description is based on data which is now seven years old may not be disadvantageous, for the purposes of this study, inasmuch as adult entertainment businesses began to flourish in the 1969-70 period.

> "Cluster 15 is a lower income, predominately old apartment area located west of the Civic Center . . . "

> "The cluster represents a total population of 174,000, 46% male and 54% female. The median age is 40. The area is mostly White, but does have an above average ethnic mix – 19% Spanish-American, 3% Japanese, 2% Chinese, 3% Black. It is a cluster of workers and senior citizens. One in five residents is over 65. Female participation in the labor force is the highest of the 30 clusters. The population under 18 is small. Many of the families are headed by women . . . "
>
> " . . . Close to seven out of ten labor active residents are white collar employed. Most completed high school and 15% completed college. At $8,700, median family income is below the average for the City. This lower income does not translate into an abnormally high poverty distribution. One in ten families and a smaller proportion of unrelated individuals are welfare recipients . . . "
>
> " . . . Residents of the cluster are centrally located to both the Downtown and its commercial-financial strip extension, Wilshire Boulevard. Many public transit routes service the area. Close to 40% of the households have no automobile. The presence of two or more cars is not common. Of the older apartment complexes many have no garage facilities . . . "
>
> " . . . Old apartments comprise 42% of the multiple units. One of the heaviest concentrations occurs east of Western Avenue and north of Olympic Boulevard. These are high density, closely packed, rectangular shaped, stucco units which line the streets approaching Wilshire Boulevard. South of Olympic

Boulevard, the pattern remains one of multiple family units, but these are generally interspersed with homes or are the end product of converted two and three story frame houses. Hollywood is similar, but is [sic] has several single family residential areas and apartment encroachment appears to have more of an impact . . . "

" . . . Most of the cluster's 102,700 dwellings are renter occupied, including a majority of the homes. Median rent averages $108, but 17% of the multiple dwellings are available for less than $80 . . . "

" . . . Single family residences are a small proportion of the total housing stock and like the area's apartments, many predate World War II. Few of the essentially single family residential neighborhoods have the kind of zoning protection which requires that new construction be single units. Replacement housing has tended to be large apartments. Homes averaged $26,000 in median value, which is more a factor of the land than the improvements. Much of the land west of Western Avenue adjoins the more expensive Hancock Park area . . . "

" . . . Cluster 15 has one of the highest population densities in the City, 19,080 persons per square mile, not exceptional for an apartment area. It also has the highest cluster average of elementary school transiency rates – 46% for incoming students and 34% for students leaving. This mobility of the residents did not seem to affect the median sixth grade reading score. It was above the City average. The cluster has 8 park sites

within its boundary and is also served by the more regional recreation areas of Echo Park, MacArthur Park and Griffith Park all of which are within access . . . "

" . . . The incidence of burglary per 100 improved parcels is high, a partial reflection of the large number of dwelling units per land parcel. One of the more disturbing aspects of the cluster is the suicide rate. Outside of Downtown, only three of the clusters had higher rates . . . "

2. *Use of 1970 Census Data to Describe Studio City and North Hollywood Areas*

There are four census tracts which comprise the Studio city study area; two such tracts in North Hollywood; and three census tracts representing the "control area" for the San Fernando Valley. (One of the "control area" tracts also forms part of the Studio City study area.)

The CAB's cluster analysis reveals that these eight different census tracts are all quite dissimilar, inasmuch as the seven tracts are contained within six different "clusters". A detailed description of each of these six clusters would not be practical for purposes of this study. However, a summary of certain key variables attributable to the two study areas in Studio City and North Hollywood, and the one corresponding control area might be instructive, and is therefore presented in Table V following. For purposes of comparison, the data is also shown for the City as a whole.

TABLE V
Comparison of 24 Variables from 1970 Census
Describing Studio City and North Hollywood Nodes
and Corresponding Control Area

VARIABLES	AREAS Studio City (Tujunga & Ventura)	North Hollywood (Lankershim & Vineland)	Control (Lankershim & Whipple)	AND VALUES Entire City
Population				
Population per sq. mile	5,742	8,265	5,893	6,041
% Persons 0-17	18.4	18.2	16.7	30.2
% Persons 65+	10.6	17.9	15.2	10.1
% White (non-Spanish)	92.0	85.3	90.7	60.3
% Black	0	0	0	17.2
% Spanish-American	6.5	13.7	7.7	18.4
% Families w/female head	10.6	16.4	16.4	16.2
Education				
% High School dropouts, 25 & older	22.1	38.6	25.3	38.1
% 25+ who have finished 4+ years college	22.0	10.2	18.3	13.9
Economics				
Approximate median family income	$15,672	$ 9,471	$12,575	$10,535
% White collar employed	80.4	60.6	77.3	57.4
% unemployed	7.8	6.1	9.1	7.0
% families in poverty	3.7	10.0	6.6	9.9
% families receiving welfare	4.3	7.6	4.7	9.9
% 1-unit structures	50.6	48.9	34.2	51.7
Approximate median value, owner occupied units	$39,141	$25,335	$35,530	$26,700
Approximate median monthly rent, renter occupied units	$ 135	$ 123	$ 129	$ 107
% of owner occupied, 1 unit, structures built before 1940	24.1	52.4	52.2	28.5
% of renter occupied, 2+ unit structures built before 1940	10.9	13.9	21.8	30.7
Crime Rates				
Assaults per 100 population	.465	.374	.478	.857
Robberies per 100 population	.172	.267	.170	.454
Burglary per 100 improved parcels	13.86	10.94	13.5	14.96
Total Arrests per 100 population	4.23	4.26	4.10	8.26
Narcotic Arrests per 100 population aged 14-44	2.66	1.39	1.60	2.04

On the basis of the foregoing 1970 Census data, it is possible to develop a general description of the two study area modes containing adult entertainment businesses in the Valley. As indicated above, such a description must necessarily be based on data applying to *entire census tracts,* even through [sic] the study areas may encompass only portions of tracts.

Residents of the *Studio City study area* node in 1970 were predominantly an upper middle income group, with a relatively high percentage of college graduates. High School dropouts were considerably below the citywide norm. Eight out of ten employed persons were in "white collar" jobs. The percentage of families receiving welfare or in poverty status was considerably below the citywide percentage. The unemployment rate was slightly higher than that of the entire city.

The median value of owner occupied homes in the Studio City area was more than $12,400 higher than the City median. About one-half of the housing units were one-unit structures. Apartment rental rates were also higher than the city as a whole. The percentage of one-unit, owner occupied housing units built before 1940 (24.1 percent) approached the citywide median of 28.5 percent.

With regard to crime statistics (as of 1970), robberies per 100 population in the Studio City area were below the rate for the city as a whole (.172 and .454, respectively), although the number of burglaries per 100 improved parcels (13.86) was close to the citywide rate of 14.96. Total arrests per 100 population (4.23) were about one-half of the 8.26 rate which prevailed citywide.

The *North Hollywood study area* contrasts rather sharply with the above described Studio City area. In North Hollywood, median family income was $9,471

in 1970 – lower than the citywide median of $10,535 – and considerably lower than the $15,672 median income of residents in the Studio City study area. Sixty-one percent of employed persons were in "white collar" jobs in North Hollywood, compared with 80 percent in Studio City and 57 percent in the entire city. The percentage of families in a poverty status in North Hollywood was considerably higher than in Studio city (10.0 percent and 3.7 percent, respectively). The percent of families in North Hollywood receiving welfare was higher than in Studio City, but lower than in the entire city. Unemployment rates, however, were lower in North Hollywod [sic] than in Studio City and the entire City.

Housing values were considerably lower in North Hollywood than in Studio City, and slightly lower than average values throughout the entire city. Median montly [sic] rents were lower in North Hollywood than in Studio City but higher than in all of Los Angeles. Of all owner-occupied one-unit structures, 52.4 percent were built prior to 1940 in the North Hollywood study area, compared with only 28.5 percent in the entire city. Single-family homes in North Hollywood are older than in Studio City.

As revealed in Table V, 1970 crimes [sic] rates for the seven variables tabulated were lower in North Hollywood than in the city as a whole. Except for "robberies per 100 population" and "total arrests per 100 population" all other rates in North Hollywood were lower than in the Studio City study area.

Tabulation of U.S. Census Trends from 1960 to 1970

Time series (trend) data can often be of value in identifying underlying socio-economic or physical characteristics which may have contributed to the change in an area. During the course of this study, the staff prepared a tabulation of the 1960-70 change in

selected socio-economic variables as reported in the U.S. Census, covering the five study areas, the four "control" areas, and the City as a whole. This was done in order to determine if changes in the study area nodes were significantly different than the "control areas", or from citywide norms.

A tabulation of this data is contained in Appendix E. A review of this data revealed that the 1960-70 trends in the variables selected (relating to population, economics and housing) were not significantly different for the study areas than for the "control areas". In general, numerical or percentage changes in the data were also similar to citywide trends and no firm conclusions of particular relevance to the study could be developed.

V.

POLICE DEPARTMENT STUDY OF HOLLYWOOD

This section of the report considers the number and percentages of adult entertainment businesses in the City, changes in these businesses since 1975, and more specifically, crime rates in the Hollywood area as compared to crime rates, citywide.

The following information was compiled by the Los Angeles Police Department and shows the incidence of certain adult entertainment establishments as of two different time periods – November of 1975 and December 31, 1976. The statistics show a decrease in massage parlors, bookstores, arcades and theaters and a slight rise in adult motels. This was during the same period of time that there was stepped-up surveillance and deployment

of officers in areas where concentrations of adult entertainment establishments existed. (The Hollywood community is within the West Bureau.)

This information and that which follows involving the incidence of crime in the Hollywood area provides what may be a positive correlation between crime and the presence of adult entertainment facilities.

TYPE OF ACTIVITY	Nov. 1975	Dec. 1976	Percent of Change
Adult Motels	37	38	+2%
Massage Parlors	147	80	-45%
Bookstores/Arcades	57	45	-21%
Theaters	47	44	-6%
TOTAL	288	207	-28%

DECEMBER 31, 1976
LOS ANGELES CITY POLICE DEPARTMENT
BUREAU OF ACTIVITY AND PERCENTAGE

TYPE OF ACTIVITY	CENTRAL BUREAU	SOUTH BUREAU	WEST BUREAU	VALLEY BUREAU
Adult Motels	5(13%)	23(60%)	5(13%)	5(13%)
Massage Parlors	6 (7%)	4 (5%)	42(53%)	28(35%)
Bookstores/Arcades	6(20%)	1 (2%)	24(53%)	11(24%)
Theaters	7(16%)	1 (2%)	28(64%)	8(18%)
TOTAL	27(23%)	29(14%)	99(48%)	52(25%)

The information in this section is an extract from a report to the Planning Department on *"The Impact of Sex Oriented Businesses on the Police Problems in the City of Los Angeles*"*, prepared by the Los Angeles City Police Department. The City Council in instructing the Planning Department to conduct the Adult Entertainment study has also instructed other City agencies to cooperate with and contribute as necessary to the report process. In accordance with such instructions, the Police Department conducted an analysis of the relationship between the concentration of adult entertainment establishments and criminal activity in the Hollywood area as compared to the citywide crime rates for the period beginning 1969 and ending 1975. This period of comparison covers the years during which adult entertainment establishments appeared and proliferated in the Hollywood area.

Part I crimes are those criminal acts which most severely effect their victims; they include homicide, rape, aggravated assault, robbery, burglary, larceny, and vehicle theft. During the period of 1969 through 1975, reported incidents of Part I crimes in the Hollywood Area increased 7.6 percent while the City showed a 4.2 percent increase. Thus, Hollywood's Part I crimes increased at nearly twice the rate of the City's increase. In conformance to the overall trend, every Part I crime committed against a person, not against property, increased at a higher rate in Hollywood Area than in the citywide total.

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* The complete report prepared by the Los Angeles City Police Department is available for review in the official files under City Plan Case No. 21475 in the Los Angeles City Planning Department.

Street robberies and 484 Purse Snatches, wherein the victim was directly accosted by their assailant, increased by 93.7 percent and 51.4 percent, respectively; the city-wide increase was 25.6 percent and 36.8 percent.

Suspected arrested for Part I criminal acts in Hollywood Area increased 16.2 percent while the City dropped by 5.3 percent. This reveals that Hollywood Area was 21.5 percent over the City's total in the apprehension of serious criminals during the seven year period.

Equally alarming as the increase in Part I arrests, is the increase in Part II arrests (described on Table VI, pages 53-54) in Hollywood Area as opposed to the rest of the City. Hollywood increased in this category by 45.5 percent while the City rose but 3.4 percent.

Prostitution arrests in Hollywood Area increased at a rate 15 times greater than the city average. While the City showed a 24.5 percent hike, Hollywood bounded to a 372.3 percent increase in prostitution arrests.

Similarly, pandering arrests in Hollywood Area increased by 475.0 percent, 3-1/2 times the city increase of 133.3 percent. (See note p. 54.)

Table VI

1969 THROUGH 1975 SURVEY PERIOD
REPORTED CRIMES AND ARRESTS

	Hollywood Area			Citywide		
Part I Offenses	1969	1975	% Change	1969	1975	% Change
Homicide	19	37	+94.7	377	574	+52.3
Rape	214	199	-7.0	2115	1794	-15.2
Agrav. Assault	605	886	+46.5	14798	14994	+1.3
Robbery	905	1591	+75.8	11909	14667	+23.2
Burglary	5695	5551	-2.5	65546	69489	+6.0
Larceny	7852	8396	+6.9	89862	93478	+4.0
Auto Theft	2621	2608	-0.5	32149	30861	-4.0
TOTAL	17911	19268	+7.6	216756	225857	+4.2
St. Robberies	381	738	+93.7	5321	6684	+25.6
484 Purse Snatches	185	280	+51.4	1951	2668	+36.8

ARRESTS

	Hollywood Area			Citywide		
Part I Offenses	1969	1975	% Change	1969	1975	% Change
Homicide	21	26	+23.8	475	573	+20.6
Rape	67	47	-29.9	858	552	-35.7
Agrav. Assault	239	348	+45.6	6250	3163	-49.4
Robbery	368	285	-22.6	4855	5132	+5.7
Burglary	864	514	-40.5	7823	6032	-22.9
Larceny	546	1371	+151.1	6877	11706	+70.2
Auto Theft	319	226	-29.2	4820	3121	-5.3
TOTAL	2424	2817	+16.2	31958	30279	-5.3

	Hollywood Area			Citywide		
*Part II Offenses	1969	1975	% Change	1969	1975	% Change
TOTAL	10660	15503	+45.4	179233	185417	+3.4

*(Part II arrests include: other assaults, forgery and counterfeiting, embezzlement and fraud, stolen property, prostitution, narcotics, liquor laws, gambling, and other miscellaneous misdemeanors.)

Prostitution Arrests	1969	1975	% Change
Hollywood Area	433	2045	+372.3
Citywide	2864	3564	+24.5

Table VI

Pandering Arrests	1969	1975	% Change
Hollywood Area	8	46	+475.0
Citywide	42	98	+133.3

NOTE: (The prostitution arrests made in Hollywood Area in 1975 represents 57.3 percent of all arrests for prostitution made in the city. The pandering arrests made in Hollywood Area in 1975 represents 46.9 percent of all pandering arrests made in Los Angeles during that year.)

DEPLOYMENT

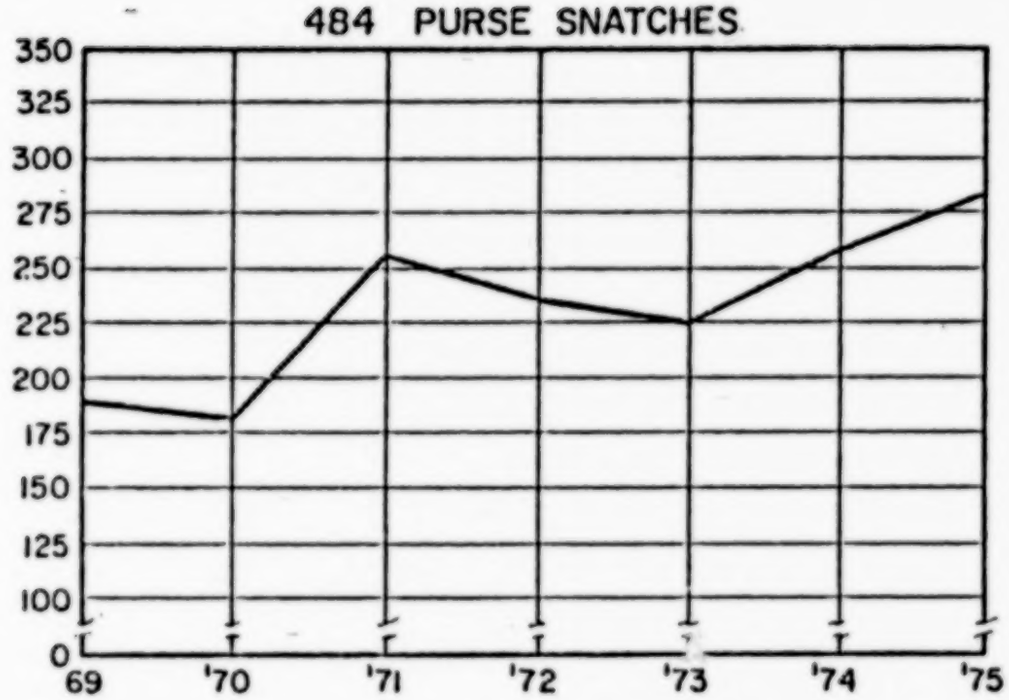
Hollywood Area	1969	1975	% Change
Patrol	197	255	+29.4
Investigators	45	61	+35.6
TOTAL	242	316	+30.6
Citywide	6194	7506	+21.1

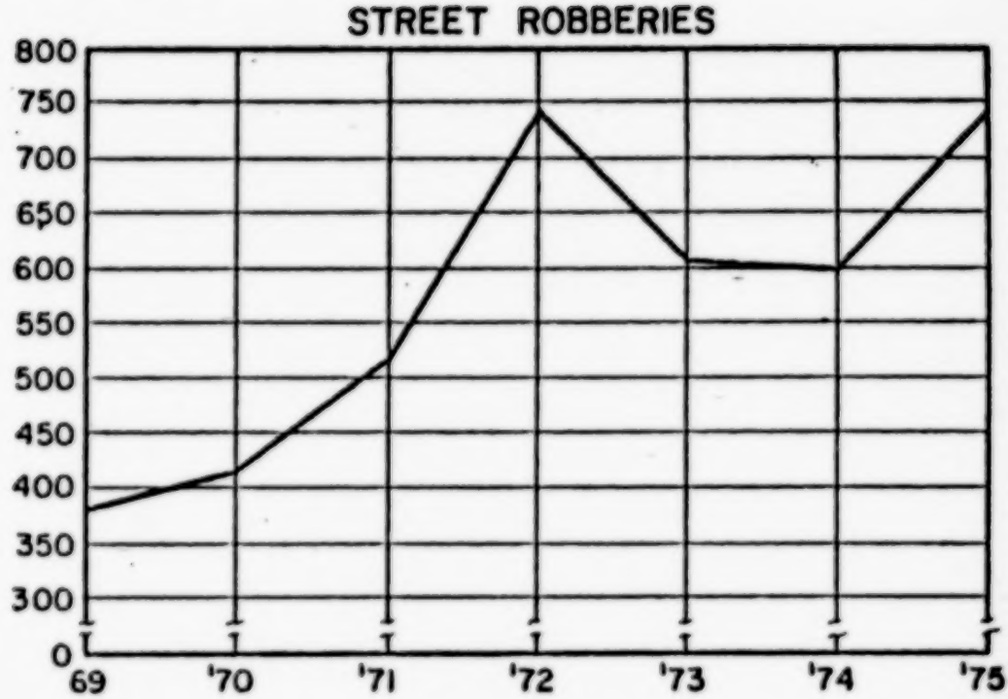
ADULT ENTERTAINMENT ESTABLISHMENTS
HOLLYWOOD AREA

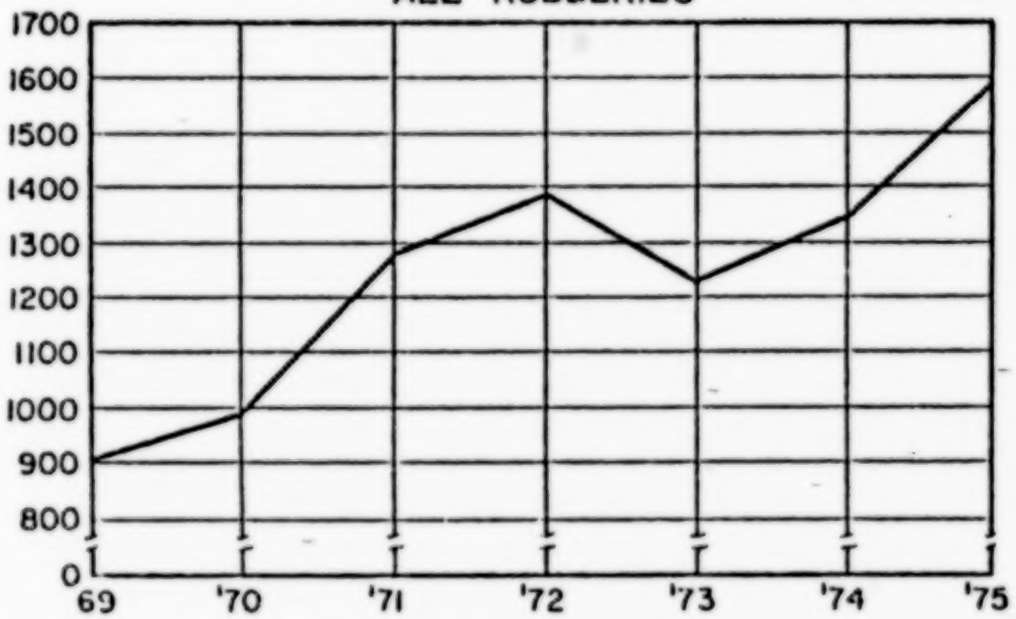
1969 through 1975

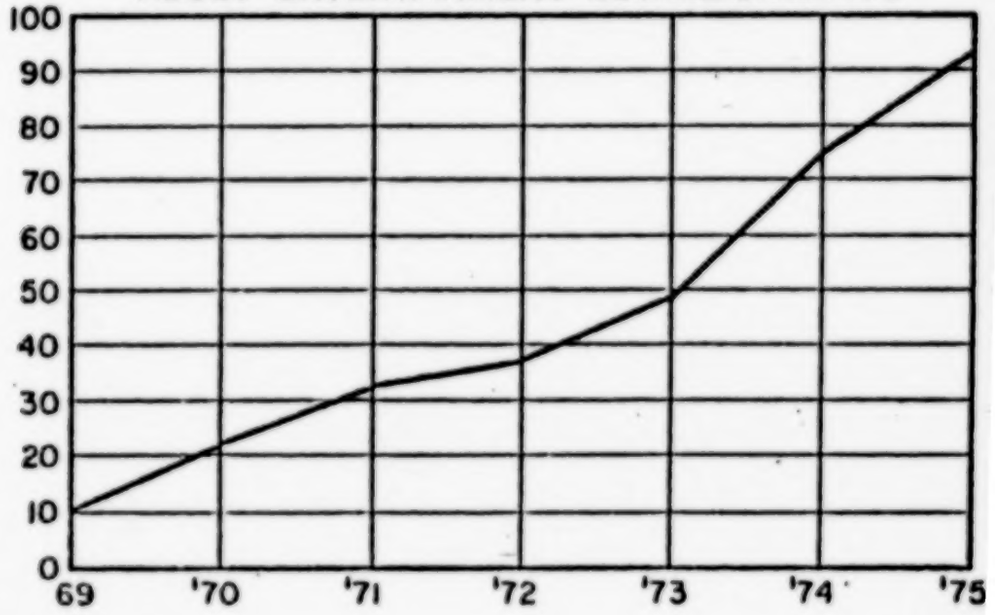
1969		1975	
1	Hard-core motel	3	Hard-core motels
2	Bookstores	18	Bookstores
7	Theaters	29	Theaters
1	Massage parlor/scam joint	38	Massage parlor/scam joints
11	Locations (Total)	88	Locations (Total)

HOLLYWOOD AREA









During the period included in this report, the Citywide deployment of police personnel rose by 21.2 percent. However, with the surge of crime in the Hollywood Area, deployment there increased by 30.6 percent, 9.4 percent higher than the rest of the City. Included in this figure is a 29.4 percent hike in uniformed officers and 35.6 percent rise in investigators to cope with the criminal elements.

This survey reflects a seven-year span during which time the Adult Entertainment Establishment in the Hollywood Area proliferated from a mere 11 establishments to an astonishing number of 88 such locations. The overall deleterious effect to the entire community is evident in the statistics provided. The overwhelming increase in prostitution, robberies, assaults, thefts, and the proportionate growth in police personnel deployed throughout Hollywood, are all representative of blighting results that the clustering of Adult Entertainment Establishments has on the entire community. These adverse social effects not only infect the environs immediately adjacent to the parlors but creates a malignant atmosphere in which crime spreads to epidemic proportions.

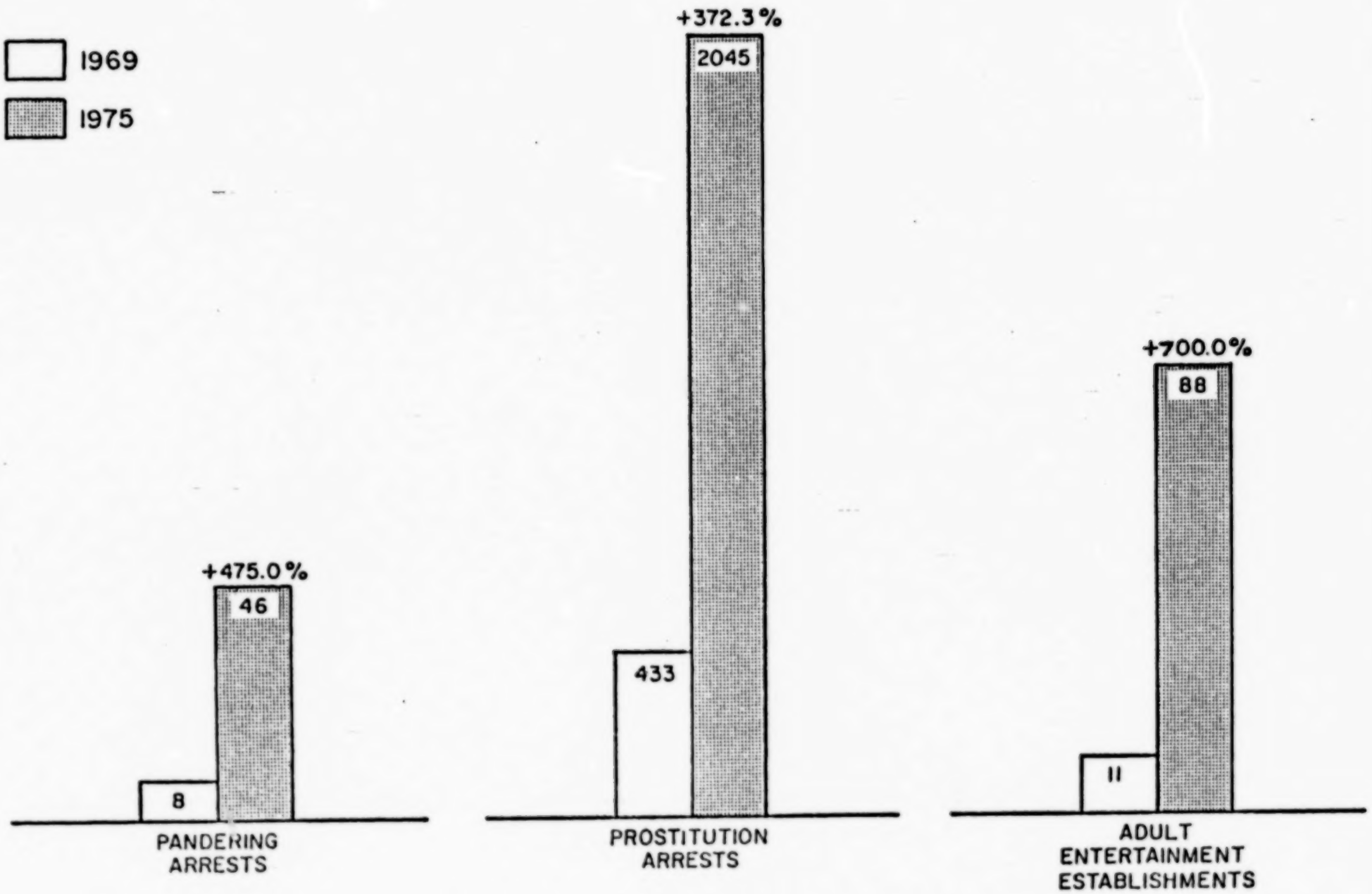
The remaining sections of the Police Department report are letters and signature petitions from concerned businessmen, clergy, merchants, citizens and police officers and are in the file and available for inspection upon request. The following paragraph summarizes this section of the Police Department report.

The police officer reports can be summarized as follows: all officers felt the sex-oriented businesses either contributed to or were directly responsible for the crime problems in the Hollywood area. The officers felt the sex

shops were an open invitation to undesirables and thereby directly caused the deterioration of neighborhoods. Also, it was suggested that these businesses purposely cluster in order to establish a "strength in numbers" type effect, once they establish a foothold in a neighborhood they drive the legitimate businesses out.

The letters from the businessmen, clubs, churches and concerned citizens were all in support of police efforts to close adult entertainment facilities. The letters all expressed the feeling that the sex shops attracted homosexuals, perverts, prostitutes and other undesirables and directly contributed to the decline of the Hollywood area.

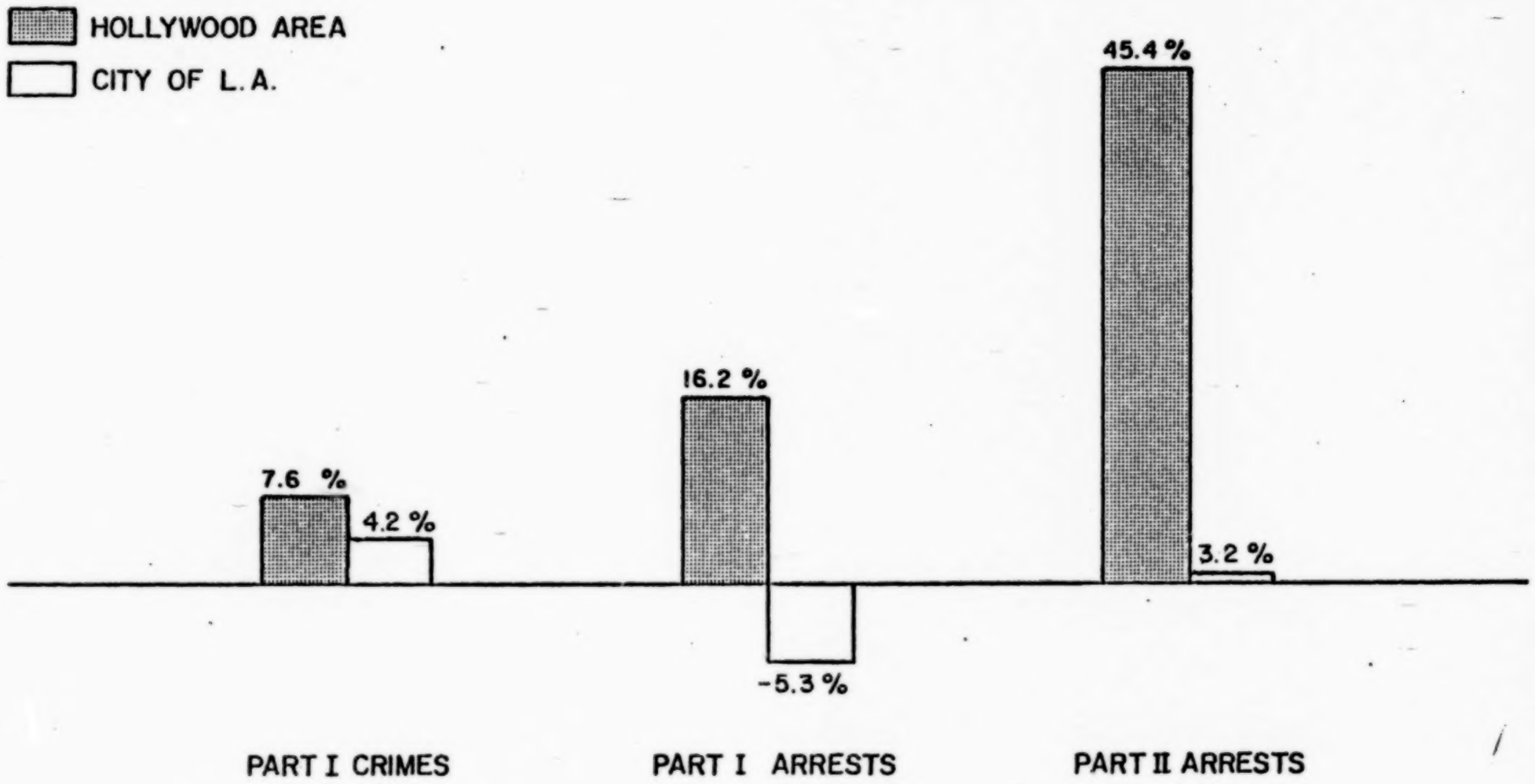
HOLLYWOOD AREA



55 - A

HOLLYWOOD AREA VS. CITY OF L.A.

RATE OF INCREASE 1969-1975



55-B

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APPENDICES

APPENDIX A
(Sheet 1)

Changes in Assessed "Market" Value of Residential and Commercial Property 1970-76; Areas of Concentration of Adult Entertainment Businesses; Corresponding Control Areas, and City of Los Angeles

Areas of Concentration ("Nodes") and Control Areas	Assessed "Market" Values: Land 1970	Land 1976	Improvements 1970	Improvements 1976	Total 1970	Total 1976
Santa Monica & Western	12,955,100	12,926,800	12,945,620	13,697,620	25,900,900	26,624,420
Control Area - Santa Monica and Vermont	11,549,300	10,990,500	9,971,400	13,227,900	21,520,700	24,218,400
Hollywood & Western	17,618,700	18,237,710	20,361,040	23,015,660	37,979,740	41,289,370
Control Area - Hollywood & Highland	21,956,500	26,197,880	39,051,920	35,992,140	61,008,420	62,190,020
Selma & Cahuenga	28,720,280	34,785,080	31,852,740	27,856,660	60,573,020	62,641,740
Control Area - Hollywood & Gower	14,502,880	17,078,900	13,411,880	12,256,520	27,914,760	29,335,420
Tujunga & Ventura (Studio City)	7,115,460	11,890,900	8,493,260	13,852,800	15,608,720	25,743,700
Lankershim & Vineland (North Hollywood)	13,789,200	15,979,300	15,287,340	16,763,160	29,076,540	32,742,460
Control Area - Lankershim & Whipple	11,168,200	18,169,000	14,744,280	18,823,200	25,912,480	36,992,200

	Land		Improvements		Total	
City of L.A.	8,303,456,720	11,216,558,900	9,692,014,680	13,464,660,940	17,995,471,400	24,681,219,84

APPENDIX A
(Sheet 2)

Changes in Assessed "Market" Value of Commercial Properties, 1970-76; Areas of Concentration of Adult Entertainment Businesses and Corresponding Control Areas

Areas of Concentration ("Nodes") and Control Areas	Assessed "Market" Values Commercially Zoned Property					
	Land		Improvements		Total	
	1970	1976	1970	1976	1970	1976
Santa Monica & Western	6,093,600	6,064,600	4,606,880	4,999,800	10,700,480	11,064,400
Control Area - Santa Monica and Vermont	4,748,500	4,153,400	2,778,800	2,893,700	7,527,300	7,047,100
Hollywood & Western	6,628,400	6,461,500	3,739,420	3,722,400	10,367,820	10,183,900
Control Area - Hollywood & Highland	13,547,420	16,936,300	18,608,880	16,525,640	32,156,300	33,461,940
Selma & Cahuenga	25,581,200	31,192,000	28,319,380	22,998,660	53,900,580	54,190,660
Control Area - Hollywood & Gower	11,056,780	12,944,100	9,645,980	7,984,840	20,702,760	20,928,940
Tujunga & Ventura (Studio City)	1,373,000	1,637,200	941,000	1,184,100	2,314,000	2,821,300
Lankershim & Vineland (North Hollywood)	2,709,800	2,689,100	3,646,360	3,789,100	6,356,160	6,478,200
Control Area - Lankershim and Whipple	2,485,500	4,530,700	4,088,740	3,828,900	6,574,248	8,359,600

	Land		Improvements		Total	
	1970	1976	1970	1976	1970	1976
City of Los Angeles	1,530,432,100	1,718,169,310	1,712,362,980	1,943,843,290	3,242,795,080	3,662,012,600

Source: City's Land Use Planning and Management System (LUPAMS) computer file

CITY OF LOS ANGELES
CALIFORNIA
[LOGO]
TOM BRADLEY
MAYOR

[Names And Address Omitted In Printing]

APPENDIX B

March 14, 1977

REQUEST FOR YOUR ASSISTANCE IN OBTAINING INFORMATION REGARDING "ADULT ENTERTAINMENT ESTABLISHMENTS"

The Los Angeles City Council has recently requested the Department of City Planning, in cooperation with the Police Department and other City agencies, to conduct a study concerning "adult entertainment" businesses.

Because of your particular knowledge of the businesses in the vicinity of your adress [sic], we are requesting that you answer the questions on the attached questionnaire. These questions relate to the effect of adult entertainment establishments on other businesses and neighborhoods in the surrounding area. The results of the questionnaire will be of great value to us in conducting this study.

Please return your completed questionnaire in the stamped envelope provided before April 1, 1977.

If you have any questions about the study or wish to discuss this matter with Planning Department staff members, please call 485-3508.

We greatly appreciate your cooperation in assisting us in this survey.

Original signed by Calvin S. Hamilton

CALVIN S. HAMILTON
Director of Planning

CSH:CSR:cd
0417B/0029A

ADULT ENTERTAINMENT QUESTIONNAIRE

Los Angeles City Planning Department

May 9, 1977

Please answer the seven questions below by checking the appropriate spaces. Feel free to write comments in the space provided or on a separate sheet.

For the purposes of this study, an adult entertainment establishment includes businesses such as: adult bookstores; nude or topless dancing establishments; massage parlors; adult theatres showing X-rated movies; "peep shows"; so-called adult motels, and bars with X-rated entertainment.

1. What overall effect do you feel that adult entertainment establishments have on a neighborhood:

   Effect on the businesses condition (sales & profits) in the area:

   positive___ negative___ no effect___

   Comments/Examples:

   Effect on homes (value & appearance) in the area immediately adjacent to adult entertainment businesses:

   positive___ negative___ no effect___

Effect on homes (values & appearance) in the area located 500 feet or more from adult entertainment businesses:

positive___ negative___ no effect___

Comments/Examples:

2. Do you feel the establishment of adult entertainment facilities in the vicinity of your business has had any of the following effects? (Please check all those effects which you feel have occurred.)

___ no effect
___ lower rents
___ vacant businesses
___ tenants moving out
___ complaints from customers
___ less crime
___ more crime
___ improved neighborhood appearance
___ deteriorated neighborhood appearance
___ other (please specify) _____
___ decreased property values
___ increased property values
___ lower taxes
___ higher taxes
___ decreased business activity

___ increased business

___ more litter

Please list specific examples relating to any box checked, immediately above.

3. What are the hours of operation of your business? ___

4. Have you seriously considered moving your business elsewhere because of nearby concentrations of adult entertainment businesses?

___ yes ___ no

Why?

5. Would you consider expanding in your current location?

___ yes ___ no; if not, why?___

_____

_____

_____

6. What types of adult entertainment establishments are there in your area? (Please check all appropriate boxes.)

___ adult bookstores

___ massage parlors

___ peep shows

___ bars with X-rated entertainment

___ nude or topless dancing

___ adult theatres

___ adult motels

How far from your business is the nearest adult entertainment establishment? ___

Thank you for your cooperation. Please return this questionnaire to:

City of Los Angeles
Department of City Planning
200 North Spring Street
Room 513, City Hall
Los Angeles, CA 90012

Name _____
(Business) _____
Address _____
_____

_____

CITY OF LOS ANGELES
CALIFORNIA
[SEAL]
TOM BRADLEY
MAYOR

[Names and Addresses Omitted in Printing]

APPENDIX C

March 14, 1977

REQUEST FOR YOUR ASSISTANCE IN OBTAINING INFORMATION REGARDING "ADULT ENTERTAINMENT" ESTABLISHMENTS

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Because of your particular knowledge of the businesses in the vicinity of your address, we are requesting that you answer the questions on the attached questionnaire. These questions relate to the effect of adult entertainment establishments on other businesses and neighborhoods in the surrounding area. The results of the questionnaire will be of great value to us in conducting this study.

Please return your completed questionnaire in the stamped envelope provided before April 1, 1977.

If you have any questions about the study or wish to discuss this matter with Planning Department staff members, please call 485-3508.

We greatly appreciate your cooperation in assisting us in this survey.

/s/ Calvin S. Hamilton
CALVIN S. HAMILTON
Director of Planning

CSH:CSR:lme

ADULT ENTERTAINMENT QUESTIONNAIRE

Los Angeles City Planning Department

March 14, 1977

Please give your opinion regarding questions set forth below by checking the appropriate spaces and providing comments in the space provided or on a separate sheet.

For the purposes of this study, "adult entertainment establishments" include businesses such as: adult bookstores, nude or topless dancing establishments; message parlors; adult theaters showing X-rated movies; "peep shows"; so-called adult motels and bars with X-rated entertainment.

EFFECT ON SURROUNDING BUSINESSES

1. What effect does the concentration of adult entertainment establishments have on the *market value* of business property (land, structures, fixtures, etc.) located in the vicinity of such establishments?

   increase in value ___
   decrease in value ___
   no effect ___

   Comments/examples: (Please cite specific examples, including available data.)

2. What effect does the concentration of adult entertainment establishments have on the rental value of business property located in the vicinity of such establishments?

increase in value ___
decrease in value ___
no effect___

Comments/examples: (Please cite specific examples, including available data.)

3. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of business property located in the vicinity (length of time required to rent or sell property; rate of lessee/buyer turnover; types of businesses of prospective lessees/buyers; conditions of sale or lease, etc.)?

increase in rentability/saleability _____
decrease in rentability/saleability _____
no effect _____

Comments/examples: (Please cite specific examples, including available data.)

4. What effect does the concentration of adult entertainment establishments have on the annual *income of businesses* located in the vicinity of such establishments?

increased income ___
decreased income ___
no effect ___

Comments/examples: (Please cite specific examples, including available data.)

5. Have any business owners or proprietors considered relocating or not expanding their businesses because of the nearby concentration of adult entertainment establishments?

Yes ___
No ___
Not known___

If yes, please indicate the specific reason, if known.

6. In recent years, has the commercial vitality (sales, profits, etc.) of any area in the City of Los Angeles been affected in any way by the nearby concentration of adult entertainment establishments?

Yes ___
No ___
Not known ___

If yes, which areas?

Comments/examples: (Please cite effects and provide available data.)

EFFECT ON SURROUNDING RESIDENTIAL PROPERTIES

7. What effect does the concentration of adult entertainment establishments have on the market value of private residences located within the following distances from such establishments?

	Increase	Decrease	No Effect
Less than 500 feet	___	___	___
500 – 1000 feet	___	___	___
More than 1000 feet	___	___	___

Comments/examples: (Please cite specific examples, including available data.)

8. What effect does the concentration of adult entertainment establishments have on the *rental value* of residential income property located within the following distances from such establishments?

	Increase	Decrease	No Effect
Less than 500 feet	___	___	___
500 – 1000 feet	___	___	___
More than 1000 feet	___	___	___

Comments/examples: (Please cite specific examples, including available data.)

9. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of residential property located within the following distances from such establishments?

	Increase	Decrease	No Effect
Less than 500 feet	___	___	___
500 – 1000 feet	___	___	___
More than 1000 feet	___	___	___

Comments/examples: (Please cite specific examples, including available data.)

OVERALL EFFECTS

10. In regard to the questions set forth above, please describe the effects which you believe the concentration of adult entertainment businesses has on each of the following:

Property values of surrounding:

Commercial property _____
Residential property _____

Rental values of surrounding:

Commercial property _____
Residential property _____

Vacancies

Number _____
Length _____

Rate of tenant turnover _____

Annual business income _____

Complaints from customers and residents due to concentration _____

_____

Neighborhood appearance _____

Crime _____

Litter _____

Other (please specify _____

_____

Thank you for your cooperation. Please return this questionnaire to:

City of Los Angeles
Department of City Planning
200 North Spring Street
Room 516, City Hall
Los Angeles, CA 90012

Name _____
Organization _____
Address _____

Do you wish to be notified of the public hearing on this matter?

_____

APPENDIX D-1

May 3, 1977

Concerned Members of the Public

ADULT ENTERTAINMENT STUDY

We wish to thank you for your interest in the above matter. Recently, residents of the Studio City area have received *erroneous* information regarding the activities of this Department. Specifically, they have been informed that it is our intent to create an "adult entertainment zone" on Ventura Boulevard. This information is not correct.

In January of this year, the Los Angeles City Council instructed the Planning Department to conduct a study to determine whether so-called "adult entertainment" establishments, where they exist in concentration, tend to have a deteriorating or blighting effect on adjacent properties and areas. Since that time, the Department staff has been evaluating data from the public and governmental agencies to determine whether evidence of such effects exists.

Within the next two months, the analysis of the information gathered will be presented to the Los Angeles City Council which will make a decision as to whether adoption of regulations is appropriate.

We regret that you were sent alarming erroneous information; if you have any further questions, please call my staff at 485-3508 or 485-3868.

(Original signed by)

CALVIN S. HAMILTON
Director of Planning

CSH:RJ:mw

_____

APPENDIX D-2

From the Desk of
MORT ALLEN

URGENT. . . . . .

Studio City (Ventura Blvd) has one of the largest concentrations of "ADULT ENTERTAINMENT MOTELS" in Los Angeles.

The attached Press Release and Questionnaire was not, to our knowledge, published in ANY locally circulated newspaper.

The hearings will be held in Hollywood & Northridge – WHY not in the Studio City area? (need we say more)

We URGENTLY request that you and your neighbors attend BOTH meetings and ALSO call or send telegrams to our elected leaders:

Joel Wachs, City Councilman
Tom Bradley, Mayor
Burt Pines, City Attorney
John Van de Camp, District Attorney
Ted Goldberg, President of Studio City Chamber of Commerce

WE ALL HAVE TOO MUCH INVESTED IN OUR PROPERTIES TO ALLOW *ANY* "RED LIGHT DISTRICTS" ANYWHERE IN THE CITY OF LOS ANGELES, AND ESPECIALLY IN THE SAN FERNANDO VALLEY.

Mort Allen
Dori Phillips
Karen Misraje
Karen Rosen
Linda Tarlow

Allen Realty INC

12516 VENTURA BLVD. • STUDIO CITY, CALIF. 91604

POPLAR 9-4444

CC opposes X-rated Ventura Blvd. zone

A proposal to designate certain areas of Ventura Boulevard as an "adult entertainment zone" shocked members of the Studio City Chamber of Commerce Board of Directors when announced at their Wednesday meeting.

Community activist Mort Allen read a notice from the Los Angeles City Planning Department announcing public meetings to be held on the proposal to create special districts for X-rated entertainment.

Howard Raphael, field deputy for Second District Councilman Joel Wachs, said Wachs would oppose designating a portion of Ventura Boulevard as an adult entertainment zone.

PRIVATELY DISTRIBUTED QUESTIONNAIRE
(Note: Not a portion of Planning Department Study)

- RESPONSES -

Total no. of responses = 197

Question	Response		
1. What effect does the concentration of adult entertainment establishments have on the market value of business property (land, structures, fixtures, etc.) located in the vicinity of such establishments?	increase in value	2	
	decrease in value	178	(90.4%)
	no effect	2	
2. What effect does the concentration of adult entertainment establishments have on the rental value of business property located in the vicinity of such establishments?	increase in value	2	
	decrease in value	169	(85.8%)
	no effect	3	
3. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of business property located in the vicinity (length of time required to rent or sell property; rate of lessees/buyer turnover; conditions of sale or lease, etc.)?	increase in rentability/ saleability	2	
	decrease in rentability/ saleability	161	(81.7%)
	no effect	3	
4. What effect does the concentration of adult entertainment establishments have on the annual income of businesses located in the vicinity of such establishments?	increased income	2	
	decreased income	149	(75.6%)
	no effect	5	
5. Have any business owners or proprietors considered relocating or not expanding their businesses because of the nearby concentration of adult entertainment establishments?	yes	71	(36.9%)
	no	4	(4.9%)
	not known	96	(48.7%)
6. In recent years, has the commercial vitality (sales, profits, etc.) of any area in the City of Los Angeles been affected in any way by the nearby concentration of adult entertainment establishments?	yes	100	(50.8%)
	no.	57	(28.9%)
	not known	___	(35.8%)

7. What effect does the concentration of adult entertainment establishments have on the market value of private residences located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	-	148 (100%)	-	148
500 - 1000 feet	-	145 (100%)	-	145
More than 1000 feet	-	142 (95.9%)	-	148

8. What effect does the concentration of adult entertainment establishments have on the rental value of residential income property located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	-	143 (99.3%)	1	144
500 - 1000 feet	-	138 (98.6%)	2 (1.4%)	140
More than 1000 feet	-	133 (95%)	7 (50%)	140

9. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of residential property located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	-	147 (100%)	-	147
500 - 1000 feet	-	141 (99.3%)	-	142
More than 1000 feet	-	141 (97.2%)	-	145

10. (Not tabulated)

In summary, the respondents felt that the subject businesses have a decidedly adverse impact on surrounding businesses and residential properties and the large majority believe that the adverse effect extends beyond the 1000-foot radius.

Comments indicate concern for:

1. personal safety, e.g. assaults
2. moral effect on children
3. safety of property, e.g. vandalism, robbery, etc.
4. neighborhood appearance. Adult entertainment establishments were described variously as tawdry, tacky, garish, seedy, messy, neglected, untidy, blighted, unkempt.
5. litter, e.g. cans, bottles, newpapers, etc., strewn about public and private property, especially heavy after Saturday night.
6. spillover parking into residential areas. On-site parking is often inadequate. Customers seeking anonymity park at a distance away from any given establishment, on residential streets.
7. graffiti on public and private property.

APPENDIX E

SANTA MONICA BOULEVARD & WESTERN AVENUE

	NODE		CITYWIDE	
POPULATION	**1960**	**1970**	**1960**	**1970**
Total Population	18,484	19,033	2,479,015	2,811,801
Black	38	340	334,916	503,606
Percentage	0.2	1.8	13.5	17.9
Spanish	540	3,833	260,399	518,791
Percentage	3.7	20.1	10.5	18.5
Median Age	42.1	38.0	33.2	30.6
Persons 0-17	2,190	3,126	756,640	849,246
Percentage	11.8	16.4	30.5	30.2
Persons 65+	2,437	3,334	253,993	283,395
Percentage	13.1	17.5	10.2	10.1
No. of Husband & Wife Families	3,153	3,380	545,109	553,564
No. of Unrelated Individuals	3,833	6,190	329,977	421,701
Average Household Size	1.95	1.90	2.77	2.68
HOUSING				
Total Units	9,859	10,667	935,507	1,074,173
Singles	2,938	1,919	559,745	560,378
Percentage	30.0	18.0	59.0	52.0
Multiples	6,921	8,748	375,762	510,261
Percentage	70.0	82.0	40.0	47.4
Built Pre-1939	7,039	5,736	481,797	328,988
All Occupied Units	9,226	9,962	876,010	1,024,835
Owner	1,330	1,078	404,652	419,801
Percentage	14.0	11.0	50.0	39.0
Renter	7,896	8,986	471,358	607,573
Percentage	86.0	89.0	43.0	56.4
ECONOMICS				
Median Family Income	5,699	7,713	6,896	10,535
Median School Years Completed	12.1	12.3	12.1	12.4
Median Value Owner Occupied in $	16,450	25,825	17,300	26,700
Median Rent in $	77	105	78	114
Total Employed	9,370	9,113	126,276	1,150,796
Unemployed	900	912	6,914	86,802
Percentage	9.6	10.0	5.5	7.5

LANKERSHIM BOULEVARD & WHIPPLE STREET
(Valley Control Area)

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	5,497	5,897	2,479,015	2,811,801
Black	9	2	334,916	503,606
Percentage	0.0	.1	13.5	17.9
Spanish	100	439	260,399	518,791
Percentage	1.8	7.4	10.5	18.5
Median Age	42.1	41.6	33.2	30.6
Persons 0-17	1,106	1,091	756,640	849,246
Percentage	20.1	18.5	30.5	30.2
Persons 65+	729	1,076	253,993	283,395
Percentage	13.3	18.2	10.2	10.1
No. of Husband & Wife Families	1,371	1,301	545,109	553,564
No. of Unrelated Individuals	841	1,337	329,977	421,701
Average Household Size	2.36	2.11	2.77	2.68
HOUSING				
Total Units	2,520	2,865	935,507	1,074,173
Singles	1,289	1,082	559,745	560,378
Percentage	51.2	37.8	59.0	52.0
Multiples	1,231	1,783	375,762	510,261
Percentage	48.8	62.2	40.0	47.4
Built Pre-1939	898	813	481,797	328,988
All Occupied Units	2,328	2,790	876,010	1,024,835
Owner	1,076	989	404,652	419,801
Percentage	46.2	35.4	50.0	39.0
Renter	1,252	1,801	471,358	607,573
Percentage	53.8	64.6	43.0	56.4
ECONOMICS				
Median Family Income	8,086	13,154	6,896	10,535
Median School Years Completed	12.6	12.6	12.1	12.4
Median Value Owner Occupied in $	22,350	37,700	17,300	26,700
Median Rent in $	92	136	78	114
Total Employed	2,574	2,736	126,276	1,150,796
Unemployed	177	280	6,914	86,802
Percentage	6.9	10.2	5.5	7.5

HOLLYWOOD & WESTERN

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	6,860	8,438	2,479,015	2,811,801
Black	3	72	334,916	503,606
Percentage	-	.1	13.5	17.9
Spanish	183	909	260,399	518,791
Percentage	2.6	10.7	10.5	18.5
Median Age	43.9	41.3	33.2	30.6
Persons 0-17	576	803	756,640	849,246
Percentage	8.3	9.4	30.5	30.2
Persons 65+	1,158	1,644	253,993	283,395
Percentage	16.8	19.4	10.2	10.1
No. of Husband & Wife Families	1,306	1,408	545,109	553,564
No. of Unrelated Individuals	2,805	3,602	329,977	421,701
Average Household Size	1.76	1.62	2.77	2.68
HOUSING				
Total Units	6,773	8,044	935,507	1,074,173
Singles	764	702	559,745	560,378
Percentage	11 3	8.7	59.0	52.0
Multiples	5,818	7,559	375,762	510,261
Percentage	85.9	94.0	40.0	47.4
Built Pre-1939	3,731	3,037	481,797	328,988
All Occupied Units	5,996	7,506	876,010	1,024,835
Owner	394	420	404,652	419,801
Percentage	5.6	5.6	50.0	39.0
Renter	5,602	7,137	471,358	607,573
Percentage	93.4	94.4	43.0	56.4
ECONOMICS				
Median Family Income	6,429	8,537	6,896	10,535
Median School Years Completed	12.5	12.6	12.1	12.4
Median Value Owner Occupied in $	22,200	37,333	17,300	26,700
Median Rent in $	92	123	78	114
Total Employed	6,535	6,745	126,276	1,150,796
Unemployed	481	575	6,914	86,802
Percentage	7.4	8.5	5.5	7.5

SANTA MONICA BOULEVARD & VERMONT AVENUE

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	16,855	15,736	2,479,015	2,811,801
Black	510	1,287	334,916	503,606
Percentage	3.0	8.2	13.5	17.9
Spanish	869	3,936	260,399	518,791
Percentage	5.2	25.0	10.5	18.5
Median Age	38.8	34.2	33.2	30.6
Persons 0-17	2,482	2,751	756,640	849,246
Percentage	14.7	17.5	30.5	30.2
Persons 65+	2,830	2,432	253,993	283,395
Percentage	16.8	15.5	10.2	10.1
No. of Husband & Wife Families	3,343	2,720	545,109	553,564
No. of Unrelated Individuals	4,881	4,818	329,977	421,701
Average Household Size	2.04	2.01	2.77	2.68
HOUSING				
Total Units	8,866	7,982	935,507	1,074,173
Singles	2,655	1,913	559,745	560,378
Percentage	30.0	24.0	59.0	52.0
Multiples	5,531	6,081	375,762	510,261
Percentage	62.4	76.2	40.0	47.4
Built Pre-1939	6,589	4,093	481,797	328,988
All Occupied Units	8,274	7,636	876,010	1,024,835
Owner	1,404	896	404,652	419,801
Percentage	17.0	11.7	50.0	39.0
Renter	6,870	6,748	471,358	607,573
Percentage	83.0	88.4	43.0	56.4
ECONOMICS				
Median Family Income	5,901	8,142	6,896	10,535
Median School Years Completed	12.2	12.5	12.1	12.4
Median Value Owner Occupied in $	15,975	24,100	17,300	26,700
Median Rent in $	76	103	78	114
Total Employed	9,073	6,528	126,276	1,150,796
Unemployed	595	465	6,914	86,802
Percentage	6.6	7.1	5.5	7.5

SELMA AVENUE CAHUENGA BOULEVARD

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	14,886	13,827	2,479,015	2,811,801
Black	43	342	334,916	503,606
Percentage	.3	2.5	13.5	17.9
Spanish	840	1,822	260,399	518,791
Percentage	5.6	13.2	10.5	18.5
Median Age	43.3	39.8	33.2	30.6
Persons 0-17	1,309	1,248	756,640	849,246
Percentage	8.8	9.0	30.5	30.2
Persons 65+	2,896	2,712	253,993	283,395
Percentage	19.5	19.6	10.2	10.1
No. of Husband & Wife Families	2,406	1,876	545,109	553,564
No. of Unrelated Individuals	6,631	5,951	329,977	421,701
Average Household Size	1.68	1.60	2.77	2.68
HOUSING				
Total Units	10,022	9,680	935,507	1,074,173
Singles	1,714	1,140	559,745	560,378
Percentage	17.1	11.8	59.0	52.0
Multiples	8,110	8,533	375,762	510,261
Percentage	80.9	88.2	40.0	47.4
Built Pre-1939	7,197	5,161	481,797	328,988
All Occupied Units	8,958	8,658	876,010	1,024,835
Owner	812	683	404,652	419,801
Percentage	9.1	7.9	50.0	39.0
Renter	8,164	7,965	471,358	607,573
Percentage	91.1	92.1	43.0	56.4
ECONOMICS				
Median Family Income	5,535	7,584	6,896	10,535
Median School Years Completed	12.2	12.5	12.1	12.4
Median Value Owner Occupied in $	20,125	30,925	17,300	26,700
Median Rent in $	80	111	78	114
Total Employed	8,112	6,990	126,276	1,150,796
Unemployed	998	943	6,914	86,802
Percentage	12.3	13.5	5.5	7.5

TUJUNGA BOULEVARD & VENTURA BOULEVARD

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	17,544	11,599	2,479,015	2,811,801
Black	50	44	334,916	503,606
Percentage	.3	.4	13.5	17.9
Spanish	398	758	260,399	518,791
Percentage	2.3	6.5	10.5	18.5
Median Age	39.6	38.7	33.2	30.6
Persons 0-17	3,638	2,137	756,640	849,246
Percentage	20.7	18.4	30.5	30.2
Persons 65+	1,368	1,232	253,993	283,395
Percentage	7.8	10.6	10.2	10.1
No. of Husband & Wife Families	4,526	2,664	545,109	553,564
No. of Unrelated Individuals	3,100	2,832	329,977	421,701
Average Household Size	2.36	2.17	2.77	2.68
HOUSING				
Total Units	8,110	5,529	935,507	1,074,173
Singles	4,520	2,716	559,745	560,378
Percentage	55.7	49.1	59.0	52.0
Multiples	3,590	2,813	375,762	510,261
Percentage	44.3	50.9	40.0	47.4
Built Pre-1939	2,058	1,009	481,797	328,988
All Occupied Units	7,548	5,367	876,010	1,024,835
Owner	3,904	2,463	404,652	419,801
Percentage	51.4	45.9	50.0	39.0
Renter	3,644	2,904	471,358	607,573
Percentage	48.3	54.1	43.0	56.4
ECONOMICS				
Median Family Income	9,956	15,672	6,896	10,535
Median School Years Completed	12.6	12.9	12.1	12.4
Median Value Owner Occupied in $	23,700	39,650	17,300	26,700
Median Rent in $	98	142	78	114
Total Employed	8,800	5,965	126,276	1,150,796
Unemployed	584	504	6,914	86,802
Percentage	6.7	8.4	5.5	7.5

HOLLYWOOD BOULEVARD AND HIGHLAND AVENUE

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	11,438	12,016	2,479,015	2,811,801
Black	38	326	334,916	503,606
Percentage	.3	2.7	13.5	17.9
Spanish	357	1,509	260,399	518,791
Percentage	3.1	12.6	10.5	18.5
Median Age	44.5	41.0	33.2	30.6
Persons 0-17	832	970	756,640	849,246
Percentage	7.3	8.1	30.5	30.2
Persons 65+	2,281	2,379	253,993	283,395
Percentage	19.9	19.8	10.2	10.1
No. of Husband & Wife Families	1,718	1,606	545,109	553,564
No. of Unrelated Individuals	5,768	6,408	329,977	421,701
Average Household Size	1.57	1.56	2.77	2.68
HOUSING				
Total Units	8,261	8,835	935,507	1,074,173
Singles	1,169	858	559,745	560,378
Percentage	14.2	9.7	59.0	52.0
Multiples	7,067	7,958	375,762	510,261
Percentage	85.5	90.1	40.0	47.4
Built Pre-1939	5,768	4,344	481,797	328,988
All Occupied Units	7,322	7,756	876,010	1,024,835
Owner	559	559	404,652	419,801
Percentage	7.6	7.2	50.0	39.0
Renter	6,781	7,197	471,358	607,573
Percentage	92.4	92.8	43.0	56.4
ECONOMICS				
Median Family Income	5,792	7,510	6,896	10,535
Median School Years Completed	12.3	12.6	12.1	12.4
Median Value Owner Occupied in $	23,000	33,300	17,300	26,700
Median Rent in $	85	117	78	114
Total Employed	6,469	6,177	126,276	1,150,796
Unemployed	861	878	6,914	86,802
Percentage	13.3	14.2	5.5	7.5

HOLLYWOOD BOULEVARD AND GOWER STREET

	NODE		CITYWIDE	
POPULATION	**1960**	**1970**	**1960**	**1970**
Total Population	7,067	2,342	2,479,015	2,811,801
Black	9	53	334,916	503,606
Percentage	.1	2.3	13.5	17.9
Spanish	292	311	260,399	518,791
Percentage	4.1	13.3	10.5	18.5
Median Age	45.2	37.3	33.2	30.6
Persons 0-17	567	227	756,640	849,246
Percentage	8.0	9.7	30.5	30.2
Persons 65+	1,445	325	253,993	283,395
Percentage	20.4	13.9	10.2	10.1
No. of Husband & Wife Families	1,316	336	545,109	553,564
No. of Unrelated Individuals	2,707	1,155	329,977	421,701
Average Household Size	1.74	1.64	2.77	2.68
HOUSING				
Total Units	4,334	1,571	935,507	1,074,173
Singles	669	226	559,745	560,378
Percentage	15.4	14.4	59.0	52.0
Multiples	3,463	1,365	375,762	510,261
Percentage	84.6	85.6	40.0	47.4
Built Pre-1939	2,778	726	481,797	328,988
All Occupied Units	3,924	1,446	876,010	1,024,835
Owner	345	93	404,652	419,801
Percentage	8.8	6.4	50.0	39.0
Renter	3,579	1,353	471,358	607,573
Percentage	91.2	93.6	43.0	56.4
ECONOMICS				
Median Family Income	6,102	8,515	6,896	10,535
Median School Years Completed	12.4	12.4	12.1	12.4
Median Value Owner Occupied in $	21,750	27,600	17,300	26,700
Median Rent in $	84	112	78	114
Total Employed	3,885	1,430	126,276	1,150,796
Unemployed	380	148	6,914	86,802
Percentage	9.8	10.3	5.5	7.5

LANKERSHIM BOULEVARD & VINLAND AVENUE

	NODE		CITYWIDE	
POPULATION	**1960**	**1970**	**1960**	**1970**
Total Population	7,600	9,344	2,479,015	2,811,801
Black	1	0	334,916	503,606
Percentage	0	0	13.5	17.9
Spanish	263	146	260,399	518,791
Percentage	3.5	1.6	10.5	18.5
Median Age	41.9	38.7	33.2	30.6
Persons 0-17	1,551	1,697	756,640	849,246
Percentage	20.4	18.2	30.5	30.2
Persons 65+	1,268	1,674	253,993	283,395
Percentage	16.7	17.9	10.2	10.1
No. of Husband & Wife Families	1,833	1,963	545,109	553,564
No. of Unrelated Individuals	1,325	2,521	329,977	421,701
Average Household Size	2.35	1.70	2.77	2.68
HOUSING				
Total Units	3,558	4,897	935,507	1,074,173
Singles	1,705	1,359	559,745	560,378
Percentage	47.9	27.8	59.0	52.0
Multiples	1,853	3,538	375,762	510,261
Percentage	52.1	72.2	40.0	47.4
Built Pre-1939	1,501	1,369	481,797	328,988
All Occupied Units	2,711	4,677	876,010	1,024,835
Owner	1,213	1,143	404,652	419,801
Percentage	44.7	24.4	50.0	39.0
Renter	2,098	3,534	471,358	607,573
Percentage	55.3	75.6	43.0	56.4
ECONOMICS				
Median Family Income	6,690	9,471	6,896	10,535
Median School Years Completed	11.9	12.4	12.1	12.4
Median Value Owner Occupied in $	17,800	25,450	17,300	26,700
Median Rent in $	86	118	78	114
Total Employed	3,483	4,452	126,276	1,150,796
Unemployed	267	291	6,914	86,802
Percentage	7.7	6.5	5.5	7.5

Temporary file
CITY OF LOS ANGELES
CALIFORNIA
[SEAL]
TOM BRADLEY
MAYOR

[Names and addresses omitted in Printing]

WHEN MAKING INQUIRIES RELATIVE TO THIS MATTER, REFER TO FILE NO. 74-4521
77-2919 & S1 CPC 26475

August 9, 1977

City Planning Department
City Attorney
Police Commission
Dept. of Building & Safety
City Clerk
Tax & Permit Division

ADULT ENTERTAINMENT ESTABLISHMENTS

At the meeting of the Council held July 28, 1977, the attached report of the Planning Committee was adopted.

At the meeting of the Council held August 9, 1977, ordinance mentioned in the attached report was presented and adopted.

/s/ Rex E. Layton

City Clerk
cm
attachment

File No. 74-4521

TO THE COUNCIL OF THE
CITY OF LOS ANGELES

Your PLANNING Committee
reports as follows:

On July 26, 1977, the Planning Committee considered a comprehensive study (orange book) submitted by the Director of Planning and a proposed moratorium prepared by the City Attorney relative to the concentration of so-called "adult entertainment" establishments, and the effect of such businesses on the citizens of Los Angeles.

CPC 26475

Some cities in the United States have adopted ordinances generally calling for either dispersal or concentration of such adult entertainment establishments. Early this year, the Los Angeles City Council instructed the City Planning Department and other concerned City agencies to study the subject of adult entertainment establishments in the City in order to determine whether concentration of such businesses have a detrimental effect on the areas in which they are located.

It is the opinion of your Committee that a "Detroit" type ordinance could be effective in battling the proliferation of sex parlors and may also discourage the opening of new ones. In addition, a stopgap ordinance should be adopted to prevent new businesses until a final ordinance can be drafted by the City Attorney's Office.

Therefore, after careful consideration, the Planning Committee feels that an ordinance similar to that adopted by the City of Detroit for dispersal of such businesses should be prepared by the City Attorney with the cooperation of the Planning Department; they were so instructed. In the

meantime, the Council should adopt an emergency ordinance declaring a moratorium.

In view of the above, and in order to keep sex-oriented businesses from clustering in various areas of the City, we RECOMMEND that the ordinance accompanying the Council file, approved by the City Attorney as to form and legality and approved by the City Planning Commission, declaring a four-month moratorium on the establishment of "adult entertainment" businesses* in the City of Los Angeles BE PLACED UPON ITS PASSAGE; said ordinance to carry an urgency clause pursuant to Section 281 of the City Charter.

Respectfully submitted,
PLANNING COMMITTEE

* Adult Bookstores
Adult Mini Motion Picture Theaters
Adult motels
Adult Motion Picture Arcades
Adult Motion Picture Theaters
Cabarets
Massage Parlors
Motel Studios
Sexual Encounter Centers

AEl:mw
7-28-77
CPC 26475
Ordinance

———

See C.F. 74-4521-5.6 for further developments on this subject.

Use CPC 28028

CITY OF LOS ANGELES
CALIFORNIA
[SEAL]
TOM BRADLEY
MAYOR

74-4521 S-3
72-4167 (CPC 24580)

[Name And Address Omitted In Printing]

January 12, 1977

City Planning Department (with file)
Controller
Data Service Bureau
City Attorney
Board of Zoning Appeals
Police Commission (attention: Marjorie Harned)
Cultural Heritage Board – Room 1500, City Hall

ARCHITECTURAL DISTRICTS

At the meeting of the Council held January 12, 1977, the attached report of the PLANNING COMMITTEE was adopted.

/s/ Rex E. Layton

City Clerk
aw
attach.

File No. 74-4521 S-3
72-4167

TO THE COUNCIL OF THE
CITY OF LOS ANGELES

Your PLANNING Committee reports as follows:

On April 7, 1976, the City Council adopted a Finance Committee report (CF 76-48) to the effect that . . . no City department may undertake a study where the cost would exceed $5,000 without approval from the Council. . . .

On November 30, 1976, your Committee considered the following three matters:

1. The Detroit decision governing adult entertainment e.g. pornography, pornographic theaters as well as adult book stores, etc. (CF 75-4521, S-2, S-2A, S-2B and S-4).
2. The Planning Department Work Program
3. Architectural Districts (CF 72-4167, CPC 24580)

The foregoing was reviewed by your Committee with representatives of the Planning Department, Police Department and the City Attorney. They advised that the City should develop background information and statistics relative to the effects of concentration of adult entertainment establishments in order to have an adequate legal basis for possible future court action. Such information should include economic impact and blighting influences of such establishments. They also pointed out that at the present time the Code Studies Section of the Planning Department has many planning projects in process which have previously been assigned by the Council. Therefore, if the Council desires to proceed with a study

on the adult entertainment issue, many of these project studies will be delayed.

With respect to Item No. 3 above, your Committee feels that the report from the Director of Planning relating to Architectural Districts has merit and should be returned to the Planning Department for more study with the cooperation of the City Attorney and possibly the Cultural Heritage Board. We recognize the fact that work in this study could be delayed three to four months if the Council approves the pornographic study.

We realize that the pornographic issue is one of the major problems faced by our City. Citizen complaints to the Police Department and Council offices are never-ending. So called "porno operations," particularly when they are concentrated, lead to the deterioration of neighborhoods. The Detroit ordinance which involves zoning regulations has been upheld by the U.S. Supreme Court. This ordinance prohibits new commercial set ventures within 1000 feet of similar existing facilities, and the operator is required to obtain approval of 51% of the residents and owners of other businesses within 500 feet of the proposed sex location.

In order to approach the problem in a reasonable manner, it is our feeling that the pornographic study should be given top priority and that the Planning Department should be authorized to proceed with the study immediately at an estimated manpower allocation cost of $25,000 for an approximate three to four-month period.

In our opinion the City should make an effort to limit the spread of commercial sex businesses. In no way is this

proposal intended to censor the social values of our citizens as we realize that there are those who desire to visit such establishments. We do recognize that in the past few years the courts seem to frown upon anti-obscenity laws as an invasion of free expression.

Therefore, after careful consideration, we (two members present) RECOMMEND by the adoption of this report as follows:

1. In accordance with Council policy under CF 76-48, that the Planning Department be authorized to proceed with an approximate three to four-month study of the pornographic problem (estimated manpower allocation cost $25,000), and that other projects under study be delayed for such period of time.

2. That other involved City departments cooperate in providing information and assistance to the Planning Department during the preparation of said report.

We FURTHER RECOMMEND that Council File 72-4167 (CPC 24580) relating to Architectural Districts be transmitted to the Planning Department for further study with the assistance of the City Attorney and the Cultural Heritage Board (it being understood that work on such study may be delayed three to four months).

Respectfully submitted,

PLANNING COMMITTEE

AE1:mw
12-3-76

EXHIBIT 5

JAMES K. HAHN, City Attorney (SBN: 66073)
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SHARON SIEDORF CARDENAS, Assistant City Attorney (SBN: 60011)
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Telephone: (213) 485-9793

Attorneys for Defendant
CITY OF LOS ANGELES

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California Corporation; and HIGHLAND BOOKS, INC., a California Corporation, Plaintiffs, vs. CITY OF LOS ANGELES, a municipal corporation, Defendant.	CASE NO. CV-95-7771 RG NOTICE OF REQUEST AND REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE; AND EXHIBITS IN OPPOSITION TO OSC RE PRELIMINARY INJUNCTION; AUTHORITY IN SUPPORT THEREOF (**VOLUME IV** of IV) **(Pages 555 to 841)** Date: December 18, 1995 Time: 3:00 p.m. Courtroom: 16

Dated: December 11, 1995

Respectfully submitted,

JAMES K. HAHN, City Attorney
CLAUDIA McGEE HENRY,
Sr. Assistant City Attorney
SHARON SIEDORF CARDENAS,
Assistant City Attorney
PATRICIA SHADE,
Deputy City Attorney

By /s/ Sharon Siedorf Cardenas
SHARON SIEDORF CARDENAS

Assistant City Attorney
Attorneys for Defendant
CITY OF LOS ANGELES

THE IMPACT OF SEX ORIENTED BUSINESSES ON THE POLICE PROBLEM IN THE CITY OF LOS ANGELES

Prepared by
Office of Special Services
Los Angeles Police Department

STATISTICAL REVIEW OF HOLLYWOOD AREA

1969 Through 1975

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INTRODUCTION

During the past several years, the City of Los Angeles has been confronted with the problem of proliferating sex oriented Adult Entertainment Establishments. This type of location includes, but is not limited to, massage parlors, adult movie theaters and arcades, adult bookstores, and other sexually oriented enterprises. It is believed that these businesses may have had blighting effects on both

business and residential communities, adversely impacting the general crime problem. Efforts to deal with this situation by the Police Department have been centered around criminal enforcement. However, it has become apparent that other methods must be utilized if the deleterious effects that sex oriented Adult Entertainment Establishments have on the City are to be curtailed. For this reason, the City Planning Department has commenced a survey to evaluate specifically what effect the clustering of these sex oriented Adult Entertainment Establishments has on the immediate environs, both socially and economically. This report is being submitted to the Planning Department as an addendum to the statistical data they have gathered as a legislative base for a City ordinance which would, by zoning, restrict the number of such establishments in a given area.

Similar efforts have been found constitutionally sound in the City of Detroit following the American Mini Theater, Inc., vs. Young case. The Hollywood Area has been selected for this study because the problem is most prevalent there due to the clustering and proliferation of the sex oriented Adult Entertainment Establishments during the past seven years.

This report statistically depicts the link between the clustering and proliferation of sex oriented Adult Entertainment Establishments in Hollywood, and the variety of criminal activity which follows. There are five sections to this report; the first section provides crime and arrest data for the Hollywood Area from 1969 through 1975, and compares the rate of increase with the remainder of the City. The remaining sections are letters and signatures from concerned businessmen, clergy, merchants, citizens,

and police officers. These individuals have lived or worked in the Hollywood Area for an extended period of time. Their letters express their opinions and observations relative to the blighting effects that the clustering of Adult Entertainment Establishments has upon the community of Hollywood.

SECTION 1

STATISTICAL REVIEW
HOLLYWOOD AREA

1969 Through 1975

This report presents an analysis of crime and arrests for the Hollywood Area compared with the City of Los Angeles for the period beginning 1969 and ending 1975. Comparison charts relating the 1969 statistics to those of 1975 are attached. This period of comparison embraces the years during which Adult Entertainment Establishments appeared and proliferated in the Hollywood Area.

CRIMES

Part I crimes are those criminal acts which most severly effect their victims; they include homicide, rape, aggravated assault, robbery, burglary, larceny, and vehicle theft. During the period of 1969 through 1975, reported incidents of Part I crimes in the Hollywood Area increased 7.6 percent while the City showed a 4.2 percent increase. In conformance to the overall trend, every Part I crime committed against a person, not against property, increased at a higher rate in Hollywood Area than in the City-wide total. Street robberies and 484 (Purse Snatches), wherein the victim was directly accosted by their

assailant, increased by 93.7 percent and 51.4 percent, respectively; the City-wide increase was 25.6 percent and 36.8 percent.

ARRESTS

Suspects arrested for Part I criminal acts in Hollywood Area increased 16.2 percent while the City dropped by 5.3 percent. This reveals that Hollywood Area was 21.5 percent over the City's total in the apprehension of serious criminals during the seven year period.

Equally alarming as the increase in Part I arrests, is the increase in Part II arrests (described on chart, P. 4) in Hollywood Area as opposed to the rest of the City. Hollywood increased in this category by 45.4 percent while the City rose but 3.4 percent.

Prostitution arrests in Hollywood Area increased at a rate 15 times greater than the City average. While the City showed a 24.5 percent hike, Hollywood bounded to a 372.3 percent increase in prostitution arrests.

Similarly, pandering arrests in Hollywood Area increased by 475.0 percent, three and one half times the City increase of 133.3 percent. (See note P. 5)

DEPLOYMENT

During the period included in this report, the City-wide deployment of police personnel rose by 21.2 percent. However, with the surge of crime in the Hollywood Area, deployment there increased by 32.5 percent, 11.3 percent higher than the rest of the City. Included in this figure is a

29.4 percent hike in uniformed officers and 35.6 percent rise in investigators to cope with the criminal elements.

COMMENTARY

This survey reflects a seven-year span during which time the Adult Entertainment Establishments in the Hollywood Area proliferated from a mere 11 establishments to an astonishing number of 88 such locations. The overall deleterious effect to the entire community is evident in the statistics provided. The overwhelming increase in prostitution, robberies, assaults, thefts, and the proportionate growth in police personnel deployed throughout Hollywood, are all representative of the blighting results that the clustering of Adult Entertainment Establishments has on the entire community. These adverse social effects not only infect the environs immediately adjacent to the parlors but creates a malignant atmosphere in which crime spreads to epidemic proportions.

1969 THROUGH 1975 SURVEY PERIOD
REPORTED CRIMES AND ARRESTS

	Hollywood Area			City-Wide		
Part I Offenses	1969	1975	% Change	1969	1975	% Change
Homicide	19	37	+94.7	377	574	+52.3
Rape	214	199	- 7.0	2,115	1,794	-15.2
Aggravated Assault	605	886	+46.4	14,798	14,994	+ 1.3
Robbery	905	1,591	+75.8	11,909	14,667	+23.2
Burglary	5,695	5,551	- 2.5	65,546	69,489	+ 6.0
Larceny	7,852	8,395	+ 6.9	89,862	93,478	+ 4.0
Auto Theft	2,621	2,608	- 0.5	32,149	30,861	- 4.0
TOTAL	17,911	19,268	+ 7.6%	216,756	225,857	+ 4.2
Street Robberies	381	738	+93.7	5,321	6,684	+25.6
484 Purse Snatches	185	280	+51.4	1,951	2,668	+36.8

	Hollywood Area			City-Wide		
Part I Arrests	1969	1975	% Change	1969	1975	% Change
Homicide	21	26	+ 23.8	475	573	+20.6
Rape	67	47	- 29.9	858	552	-35.7
Aggravated Assault	239	348	+ 45.6	6,250	3,163	-49.4
Robbery	368	285	- 22.6	4,855	5,132	+ 5.7
Burglary	864	514	- 40.5	7,823	6,032	-22.9
Larceny	546	1,371	+151.1	6,877	11,706	+70.2
Auto Theft	319	226	- 29.2	4,820	3,121	-35.9
TOTAL	2,424	2,817	+ 16.2%	31,958	30,279	- 5.3%

	Hollywood Area			City-Wide		
Part II Arrests*	1969	1975	% Change	1969	1975	% Change
TOTAL	10,660	15,503	+45.4%	179,233	185,417	+ 3.4%

* Part II arrests include: other assaults, forgery and counterfeiting, embezzlement and fraud, stolen property, prostitution, narcotics, liquor laws, gambling, and other miscellaneous misdemeanors.

Prostitution Arrests	1969	1975	% Change
Hollywood Area	433	2,045	+372.3
City-wide	2,864	3,566	+ 24.5

Pandering Arrests	1969	1975	% Change
Hollywood Area	8	46	+475.0
City-wide	42	98	+133.3

NOTE: The prostitution arrests made in Hollywood Area in 1975 represents 57.3 percent of all arrests for prostitution made in the City. The pandering arrests made in Hollywood Area in 1975 represents 46.9 percent of all pandering arrests made in Los Angeles during that year.

DEPLOYMENT

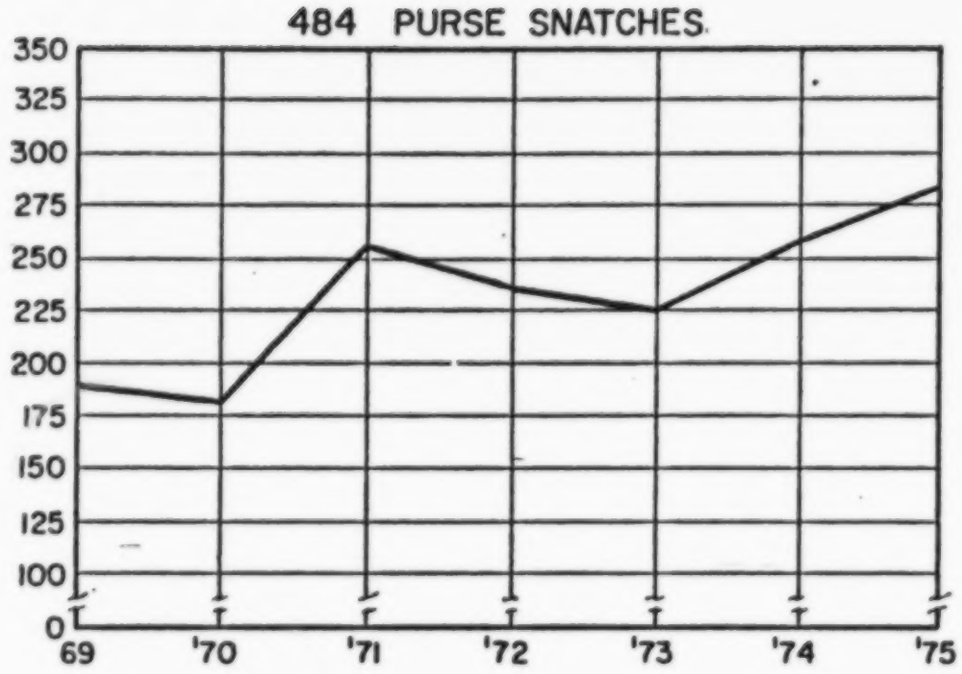
Hollywood Area	1969	1975	% Change
Patrol	197	255	+29.4
Investigators	45	61	+35.6
TOTAL			+32.5
City-wide	6,194	7,506	+21.2

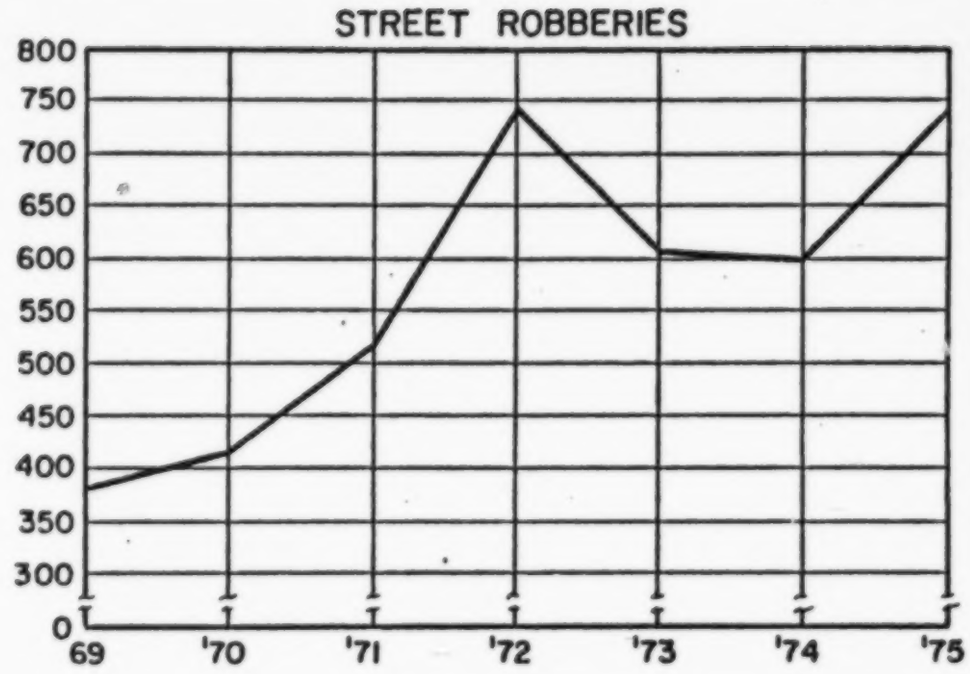
ADULT ENTERTAINMENT ESTABLISHMENTS
HOLLYWOOD AREA

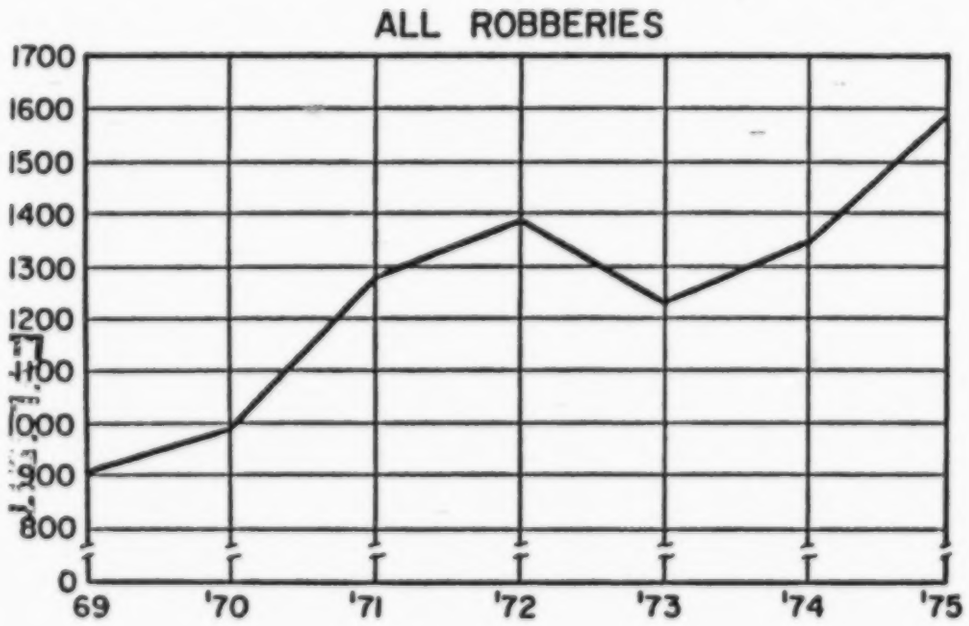
1969 THROUGH 1975

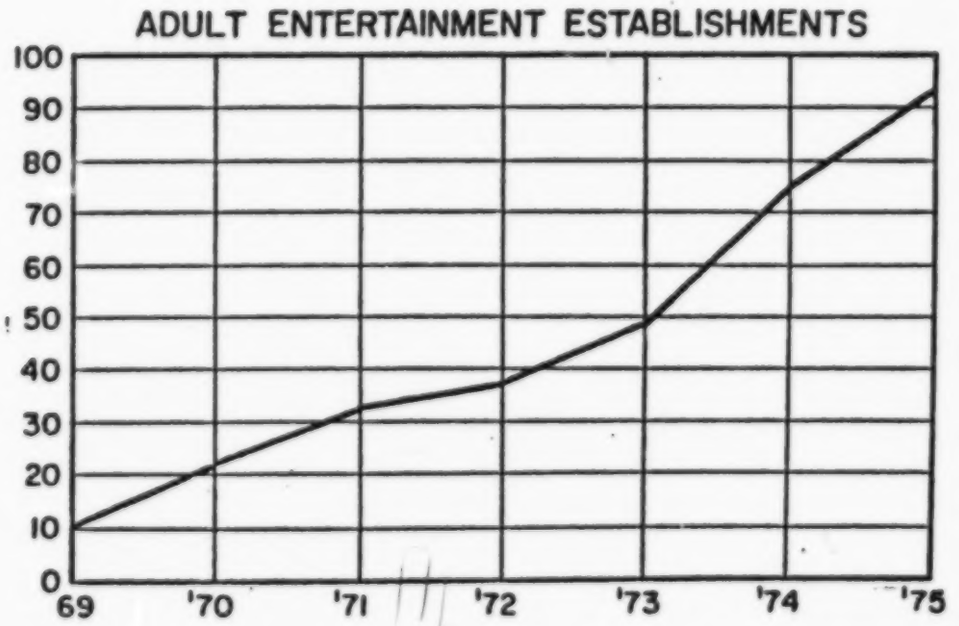
1969		1975	
1	Hard-core motel	3	Hard-core motels
2	Bookstores	18	Bookstores
7	Theaters	29	Theaters
1	Massage parlor/scam joint	38	Massage parlor/scam joints
11	Locations (Total)	88	Locations (Total)

HOLLYWOOD AREA

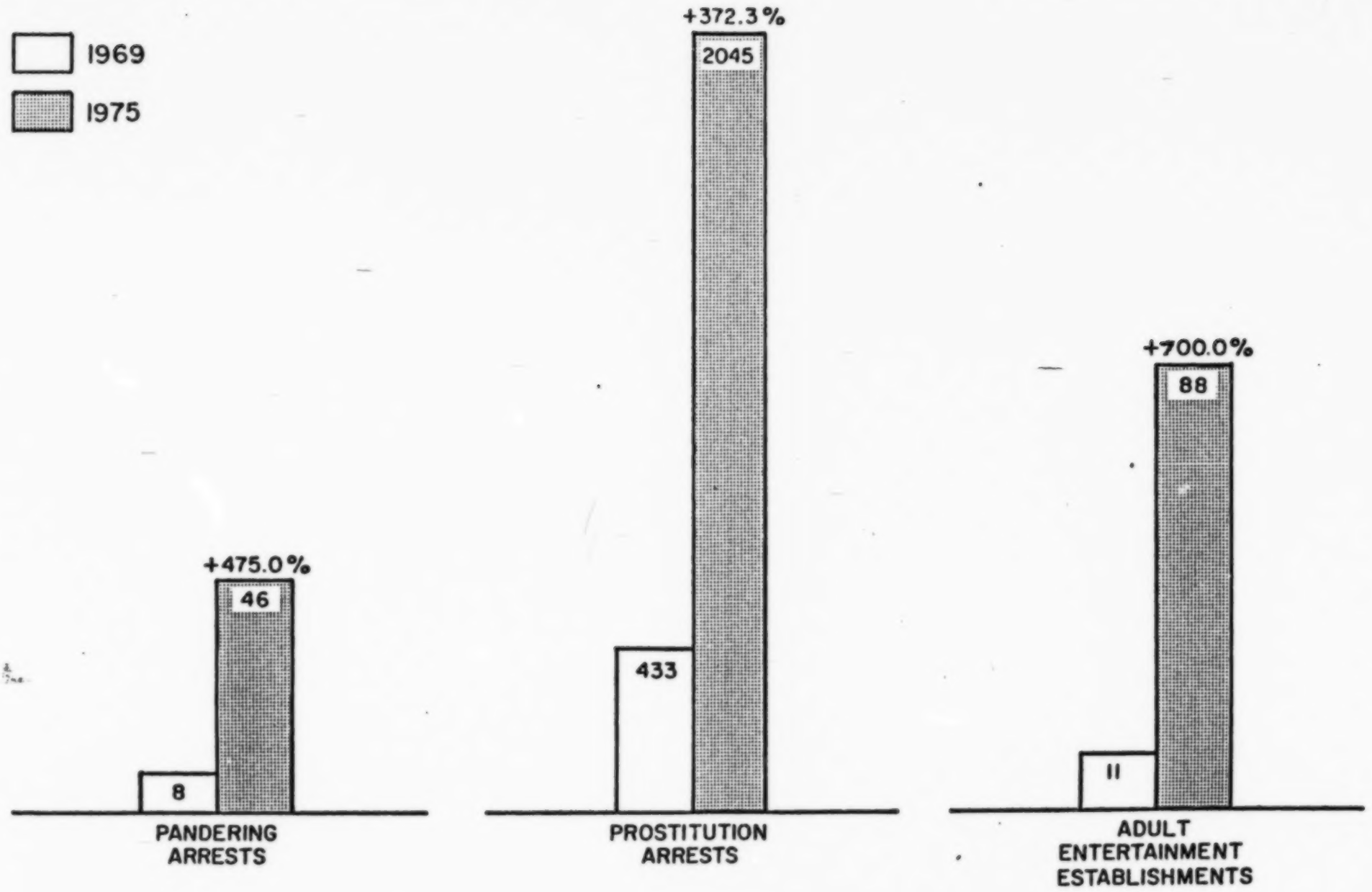






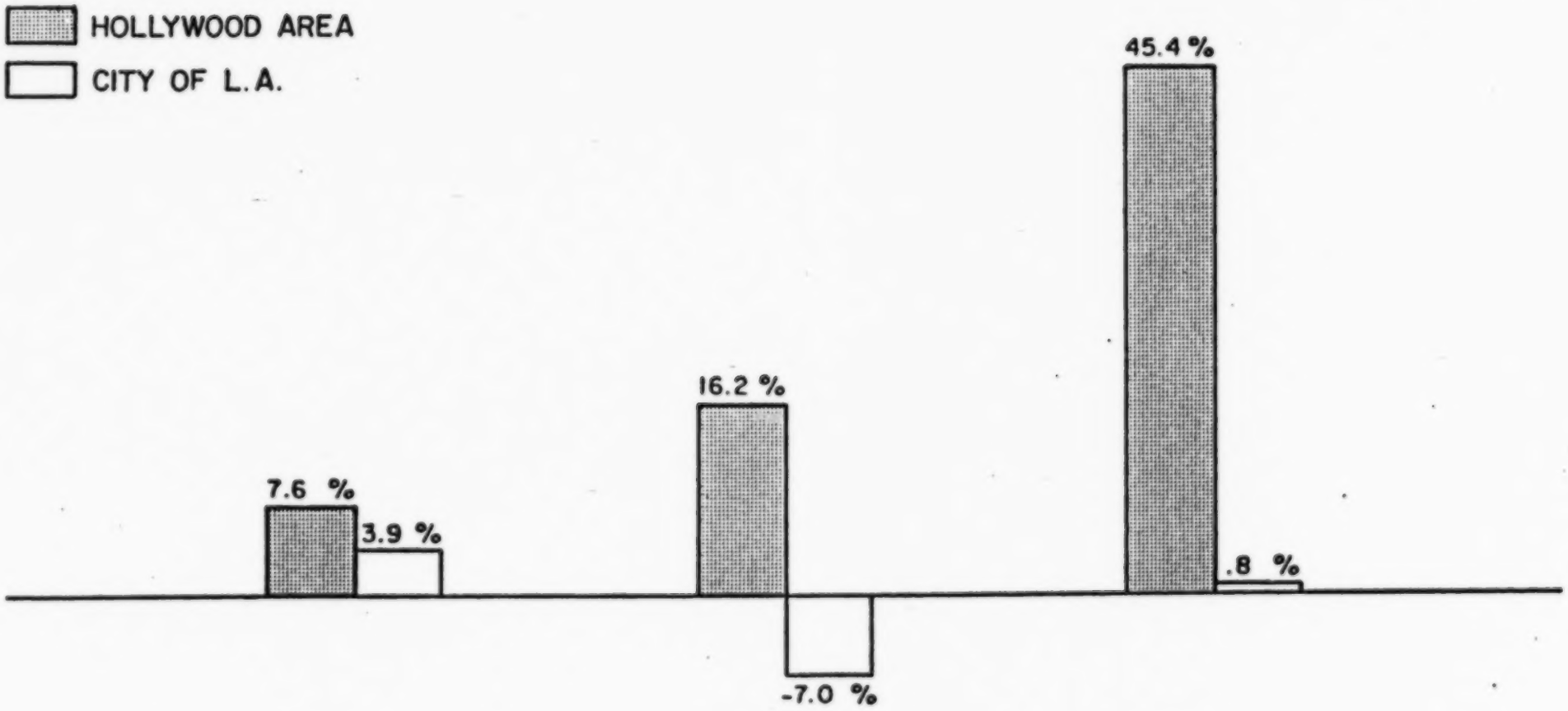


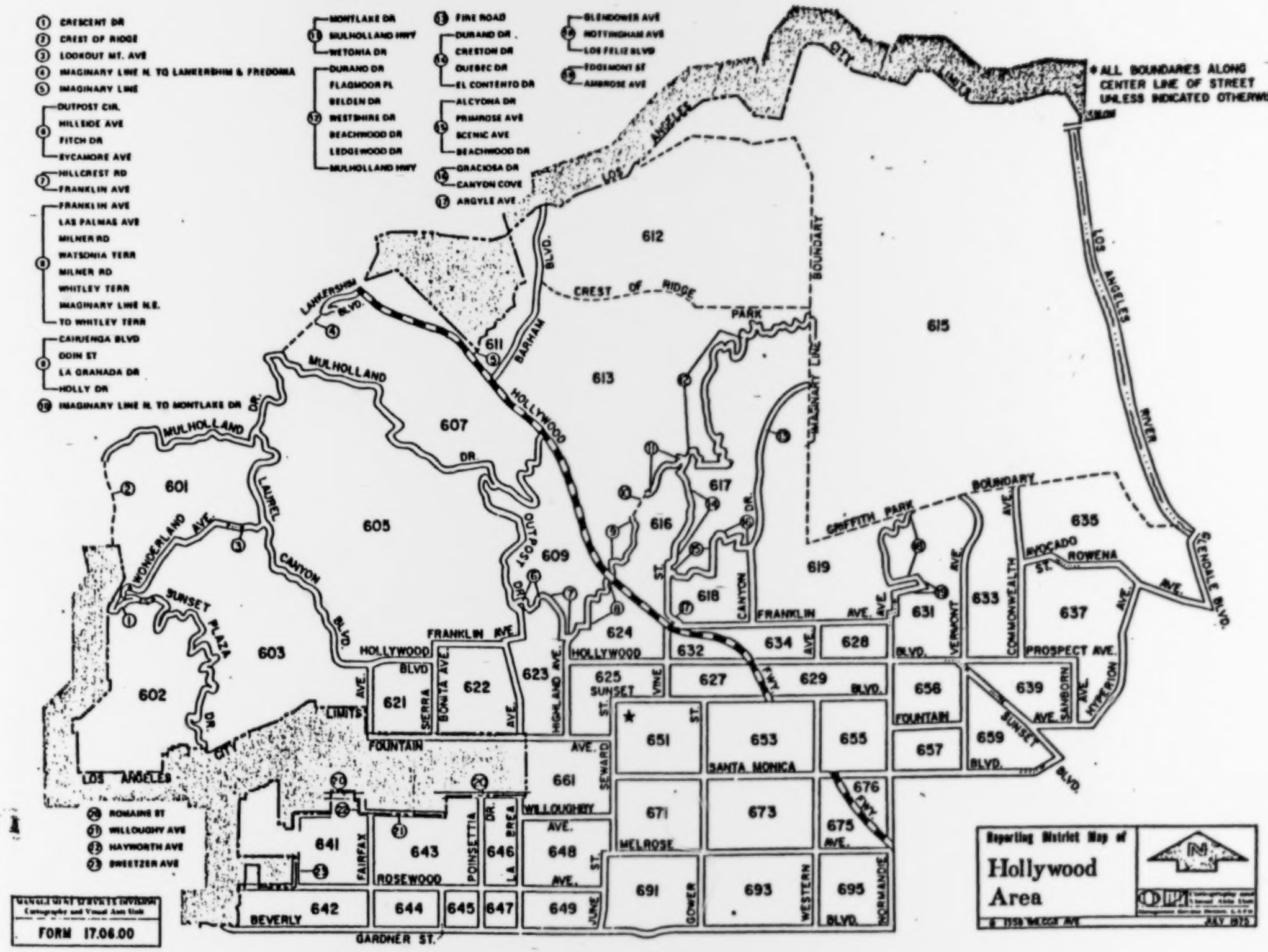
HOLLYWOOD AREA



HOLLYWOOD AREA VS. CITY OF L. A.

RATE OF INCREASE 1969 - 1975





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No. 00-799

Supreme Court, U.S.
FILED
MAY 14 2001
CLERK

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX
VOLUME II, PAGES 184 TO 306

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Petition For Certiorari Filed November 17, 2000
Certiorari Granted March 5, 2001

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California corporation, and HIGHLAND BOOKS, INC., a California corporation, Plaintiffs, vs. CITY OF LOS ANGELES, a municipal corporation, Defendant.	) CASE NO. CV 95-7771 DDP (CTx)) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CITY OF LOS ANGELES' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES ON THE FIRST AND THIRD CAUSES OF ACTION; DECLARATIONS OF FRANKLIN P. EBERHARD AND P. NELSON KING AND EXHIBITS**) Date: August 25, 1997) Time: 10:00 a.m.) Place: Courtroom 24) (Filed Jun 30, 1997)

DECLARATION OF FRANKLIN P. EBERHARD

I, FRANKLIN P. EBERHARD, declare:

1. The facts set forth in this declaration are personally known to me. If called as a witness, I could and would competently testify thereto.

2. I am the Deputy Director, Department of City Planning for the City of Los Angeles. I have held that position for six years. My duties are to supervise the Office of Zoning Administration including the Zoning Administrator, Code Studies Unit, Deputy Advisory Agency, Environmental Section, and Public Counter. I also supervise the Citywide Planning Division. I am the Assistant General Manager of the Planning Department.

3. Before being appointed to my current position I held the following positions in the Department of City Planning: Chief Zoning Administrator, Senior City Planner, City Planning Associate and Planning Assistant.

4. During the time that I was the supervisor of the Code Studies section of the Department, the City Council instructed the Department of Planning, with the assistance of other City Departments to conduct a study on the effects of the concentration of adult businesses on the surrounding community. As part of that study we identified the various types of adult uses, using the various types of uses already regulated by the zoning code, i.e., retail uses and amusement uses. An example of an amusement type of use would be a "peep show," motion picture theater, or video arcade. An amusement use generally is a place of business devoted primarily or in some

substantial degree to providing on-site public entertainment.

5. The Los Angeles Municipal Code has historically regulated amusement enterprises separately from retail uses. Some examples of amusement enterprises include penny arcades, game arcades, video arcades, shooting galleries and the like. Amusement arcades are first permitted in the C2 Zone. They are not allowed in the CR, C1, C1.5, MR1, or MR2 Zones. These uses would be permitted by right, without discretionary land use review provided they were in the proper zone.

6. Bookstores are considered to be a retail use. A bookstore (new) is first permitted in the C1 Zone and used bookstores are first permitted in the C1.5 Zone. Bookstores are allowed in all of the commercial zones, except the CR Zone. In general, a retail use involves the provision of goods or commodities for use or consumption off-site.

7. The reason for treating amusement enterprises differently from bookstores is based on the historical experience of the City regarding the impacts associated with amusement uses. Those impacts are noise, hours of operation, parking and loitering.

8. There are other examples of uses in the zoning code, which although commonly thought of as symbiotic in nature, have in fact been considered separate uses and are therefore regulated differently. An example of this is automotive repair garages and automotive service stations. An automotive repair garage requires a 300-foot distance from residential uses, whereas a automotive service station does not.

9. In drafting the Adult Entertainment Zoning Ordinance it was reasonable to use the existing categories of uses contained in the Los Angeles Municipal Code, since the import of the ordinance was to further control the location of these uses. In my opinion it was reasonable to use the same categories of uses already regulated because the ordinance merely imposed additional restrictions on those uses based on the adverse secondary impacts when those uses were engaged in the provision of sexually-oriented materials.

10. In my many years in the Department of City Planning I have had the opportunity to study the effects of the provision of more than one type of business at a single location. It has been my experience that a location that only has one business does not have as many impacts on the surrounding community compared to a location with more than one business. As an example, the code has special regulations for "mini-malls." The reason for the regulations is that the concentration of a number of businesses at one site contributes to traffic problems, parking problems, litter, noise and other adverse impacts on the surrounding community.

11. Therefore, transferring this experience to the adult entertainment issue, it was reasonable for the City Council to conclude that the concentration of more than one adult entertainment business at one site would have more impacts than one business standing alone.

12. The City Council decided to use the dispersal method to mitigate the impacts caused by the concentration of adult entertainment businesses. The City has successfully used dispersal type ordinances to deal with

other land use problems. In the Westwood Village Specific Plan the ordinance requires the dispersal of fast food establishments. The City had identified land use impacts caused by the proliferation of fast food outlets. To combat these impacts the Westwood Specific Plan included spacing requirements. Another example can be found in the Citywide Sign regulations which require off-site signs to maintain a minimum distance from another off-site sign.

I declare under penalty of perjury and the laws of the state of California that the foregoing is true and correct.

Dated this [Illegible] day of April, 1997.

/s/ [Illegible]
FRANKLIN P. EBERHARD

FILM

AN INTER-

NATIONAL

HISTORY OF

THE MEDIUM

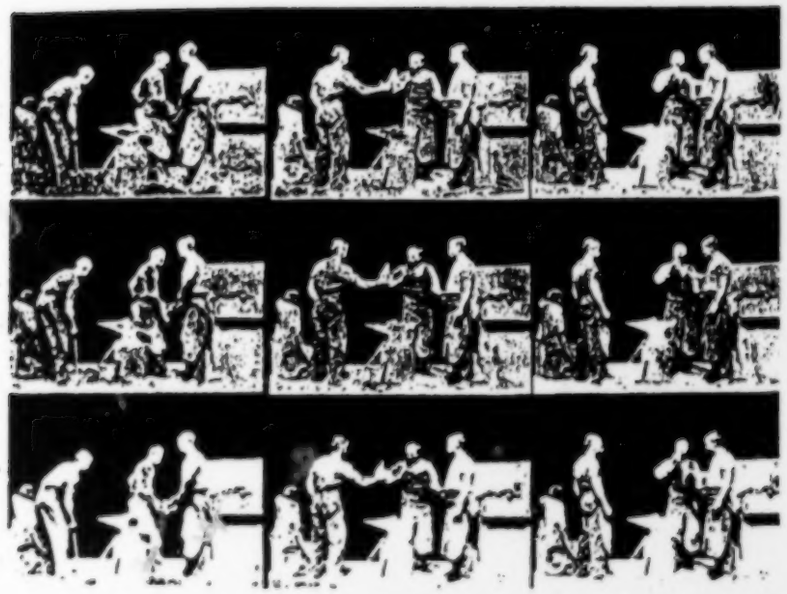
By Robert Sklar

Harry N. Abrams, Inc., Publishers

* * *

design for recording movement on film that has lasted with little change for one hundred years (though the electronic recording of images by video camera, is, of course, fundamentally different).

The Black Maria. Further improvements in the apparatus led to public exhibitions in 1893 and the opening of commercial viewing parlors in 1894 in the United States, France, and England. To foster the commercial development of his devices, Edison also constructed a studio on his laboratory grounds. This was a shed-like structure built on a turntable to follow the sun, with a roof that opened to let in sunlight, and walls of black tar paper. The staff called it "the Black Maria" because they thought it resembled the police patrol wagons of the era, which went by that nickname. In early 1894 vaudeville performers came over from New York to record their acts for Edison's camera. With film rolls 50 feet in length, these films lasted about twenty seconds, a single shot from a stationary position, without editing or camera movement. At the same time Edison's company was manufacturing the Kinetoscope viewing machines. These were box structures containing a motor-and-shutter mechanism much like the camera's that ran a loop of positive film past an electric light source. The spectator peered through a small window to see the image. Originally the machines could only accommodate, like the cameras, 50 feet (or twenty seconds) of film, but within a few months some were modified to hold 150 feet of film, about a minute of screen time. Edison made deals with several firms to sell them both Kinetoscopes and films to show in them. A Kinetoscope parlor opened in New York in April 1894.



Left: 1.23. Frames from Blacksmith Scene, *shot in the Black Maria in early 1893. This film was featured at the first public exhibition of Edison's Kinetograph camera and Kinetoscope viewer on May 9, 1893. Using a magic lantern, individual frames were projected before an audience of several hundred; then people lined up to view the complete film in the Kinetoscope, one at a time. This event has led early-cinema historian Charles Musser to call* Blacksmith Scene *"the first commercial-length modern motion-picture subject to the publicly exhibited."*

Edison and Dickson had apparently given little attention to the possibility of projecting their images. They continued to operate from the example of the phonograph, which had successfully been marketed in public commercial spaces with instruments for individual listening. The long tradition of magic lantern screen entertainment, however, with large-sized images projected before large-sized audiences, suggested both the technical and economic inferiority of the Kinetoscope "peep shows." Edison's achievement only spurred others to surpass him

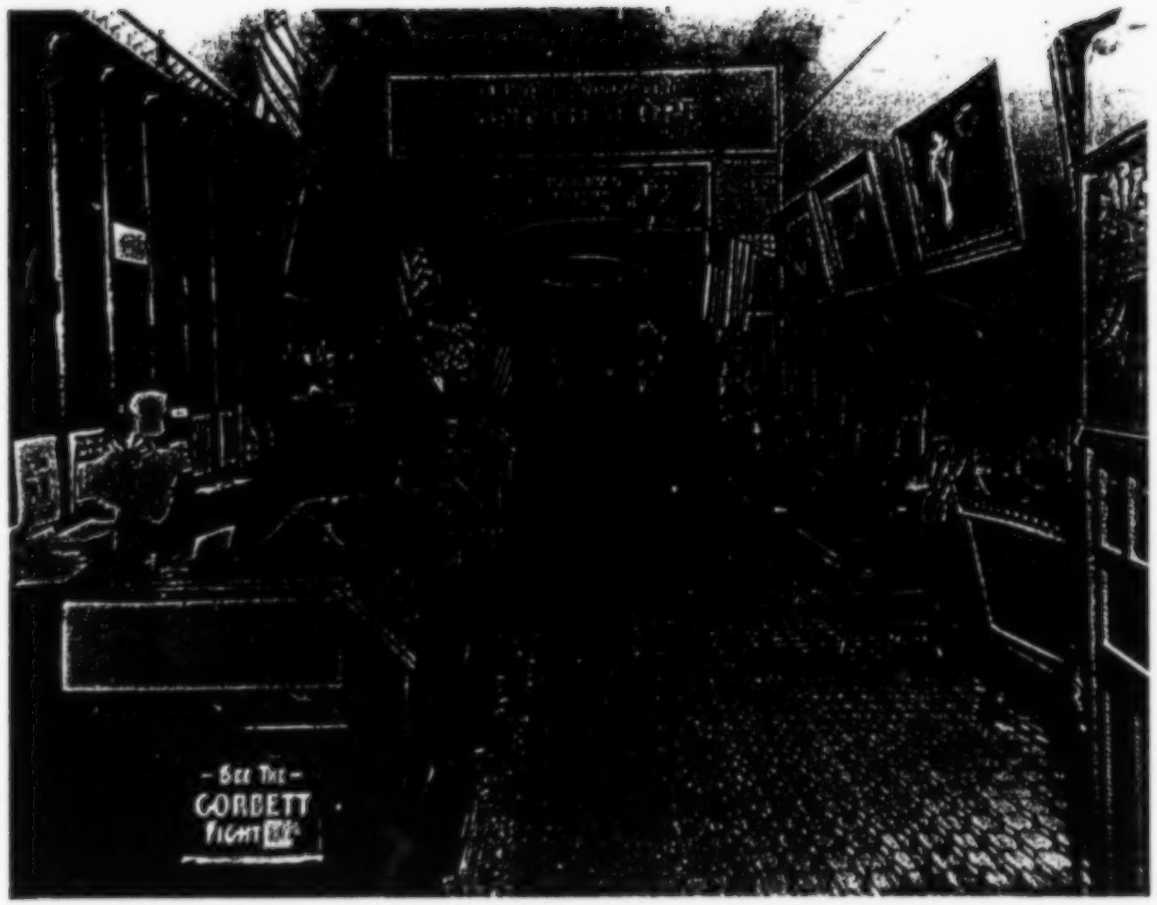
by inventing a motion picture projector. Dickson joined the effort when he left Edison's company in April 1895.

Below: 1.24. The Lumière Cinématographe camera depicted on a catalogue cover, 1897; when linked with a magic lantern lamp and lens, this apparatus functioned as a projector.

PROJECTED FILMS

By that time, however, the first projected motion pictures had already been demonstrated in France. The inventors were the brothers Auguste and Louis Lumiére (1862-1954; 1864-1948), who ran in Lyons an important firm for manufacturing photographic equipment. Knowing of Edison's

work, they sought to compete with an apparatus of their own. What they came up with in early 1895 was a device whose versatility surpassed any previous invention. Called the Cinématographe, it was a light-weight, hand-cranked machine that advanced the film roll through a claw mechanism. They found that it not only could operate as a camera but could be used to throw large-sized images onto a screen when it was linked with projecting equipment familiar from magic lantern shows. With their Cinématographe, they shot films and projected them for select groups repeatedly during 1895. At



Left: 1.25. Tally's Edison Phonograph and Kinetoscope Parlor, the first motion picture exhibition space in Los Angeles, in 1896. In July of that year the proprietor Thomas L. Tally (shown at left) began offering "mammoth" projected images as well as peep-show viewers and audio headsets for phonograph recordings; the sign identifies the new apparatus as "projecting Kinetoscope" rather than its official name, Vitascope.

the Congrés des Sociétés Françaises de Photographie in June 1895 they filmed the delegates getting off a boat and projected the film for its subjects the following day. The premiere of projected motion pictures for the general public came on December 28, 1895, in Paris.

Below: 1.26. Just before the April 1896 Vitascope debut, the Edison company shot one of its most popular films for the new projector, The May Irwin Kiss, *depicting performers May Irwin and John Rice reenacting a climactic scene from their theatrical hit,* The Widow Jones.

Inventors in Germany, England, and the United States were on their heels. In Berlin, another pair of brothers, Emil and Max Skladanowsky (1859-1945; 1863-1939), projected films with their Bioscop apparatus,

which featured two film strips whose frames were alternately exposed, in November 1895. In London, the Kineopticon projector of Birt Acres (1854-1918) showed films in January 1896; it was based on a camera that Acres had earlier developed with Robert W. Paul (1869-1943), which in turn derived from Marey's chronophotographic camera (Acres went on to devise in 1899 a low-cost camera, the Birtac, for nonprofessional use – what would later be called "home movies"). The first American projector was developed by Charles Francis Jenkins (1867-1934) and Thomas Armat (1866-1948), later by Armat alone in a commercial arrangement with Edison. The projector, the Vitascope, which used sprocket wheels to advance the film, was marketed as an Edison product and made its debut on April 23, 1896, at Koster & Bial's Music Hall in New York.

THE ADVENT OF MOTION PICTURES

Before considering more closely the films exhibited at these early screenings, we should step back for a moment to reflect once more on our subject: the emergence of motion pictures at the end of the nineteenth century. From our later position in historical time, we may say that we are observing an awesome moment launching a phenomenon that changed the world. But *why* did

* * *

these newcomers came from agricultural regions and were new to factory work and city life. Too poorly paid to afford vaudeville prices and working such long hours that they had little time for amusements at all, this population proved a fertile opportunity for entrepreneurs, themselves often immigrants, who found a way to offer them inexpensive popular entertainment – the five-cent movie theater, or nickelodeon. It is no coincident that these theaters first made an impact in such heavily industrialized centers of immigrant settlement as Pittsburgh and Chicago...Within a couple of years there were many hundreds of nickelodeons across the United States.

This expansion of exhibition generated enormous profits – at first for the exhibitors more than the producers. It occurred several years before Pathé led the switch from selling to renting films, so in the beginning of the nickelodeon boom producers received only their original price for a print, regardless of how many times the print was screened and how many people saw it. Once the rental system began, payment varied according to length of time, number of screenings, audience size, and box office receipts (and the exhibitor's honesty in reporting these figures). Renting films necessitated setting up a new tier of organization, the film exchange, which handled distribution of prints to exhibitors. A new level of complexity entered the industry: with higher profits came a demand for increased production, an elaborate system to control prints, and, for the first time, critical feedback from audiences, exhibitors, the expanding entertainment trade press, and concerned social and cultural organizations.

2.25 The five-center theater, beginning around 1905, made movies part of everyday life for immigrant and working-class Americans. When storefront operations were photographed, owners and employees often posed at the door, as at the World's Dream Theatre in St. Louis, Missouri.

Movies and Society

This critical feedback from different groups marked the emergence of a distinct public sphere for motion pictures. The medium's quality – and deficiencies – now became a focus for public debate. Social organizations concentrated on the moral issues, while for critics, exhibitors, and audiences the concerns were more on the aesthetic side. The nickelodeons were magnets for young people, families, and even mothers with babies, as evidenced by photos of nickel theaters with baby carriages parked outside. Those concerned for the morals of such audiences criticized the elements of violence and sexual titillation on which the cinema of spectacle often relied. Those

concerned with aesthetics criticized primitive cinema for its frequent incomprehensibility. Reliance on audience familiarity with the story grew more untenable as patrons came from increasingly varied cultural backgrounds and training. Production companies expanded the plot synopses they supplied to exhibitors (to promote rentals, and also as background information for lecturers), but these sometimes contained so much more narrative information than did the screen images that they proved the critics' point.

There were complaints centering on the theaters themselves for which the producers did not bear direct responsibility. These concerned hygiene, lighting, safety, and the broader question of whether children should be exposed to alluring impressions outside the bounds of the official school and church cultures. Some wanted the movies controlled out of censoriousness, others out of a desire to uplift the medium's environment and cultural values.

Motion Picture Patents Company

Where control was an issue, Thomas Edison would eventually be sure to have his say. As the motion picture industry transformed itself, Edison had continued to pursue his legal cases. After 1907, with the shift from selling to renting films, he had a new card to play: he could put pressure on the new distribution firms, or film exchanges, to handle only films produced by companies that paid him royalties for using his patents. The overall strategy, as it had been for a decade, was to control the motion

picture industry, but under the new industrial circumstances it would serve additional purposes. Only a select group of theaters that charged higher

* * *

2.26 Moralists' concerns about unseemly behavior in nickelodeons were countered by lantern slide advice.

REVISED
EDITION

THE MOVIES

BY
RICHARD GRIFFITH
AND
ARTHUR MAYER

with the assistance of
EILEEN BOWSER

SIMON AND SCHUSTER, NEW YORK

Thomas Alva Edison

THE BIRTH OF THE MOVIES

WHITE MAGIC

The nineteenth century was rushing toward its close, propelled by steam and electricity. The railroad, the steamship, the telegraph, the telephone, the phonograph, and the internal combustion engine took their places in human life in bewildering succession, but the American people never tired of exclaiming, "What hath God wrought?" even though they were more inclined to attribute most of these marvels to Thomas A. Edison. The barbarous human past was dead, and with it all superstitious beliefs and forebodings. "White Magic," the miracle of science was called in the 1890s, and it was to be the successor to those dark, abandoned superstitions. It led straight to Utopia, everybody agreed, and no one mentioned Pandora and her box.

Edison himself, the high priest of the new gospel, had invented the phonograph in 1876 and shortly thereafter began to try to contrive its visual equivalent. By 1889, he and George Eastman had perfected the frame-lined celluloid strip which set pictures in motion. Having solved the basic problem, he had little interest in going further. He regarded the invention as a toy and did not respond to the urging of his associates that he try to find a way of projecting these one-inch film images from the confines of a small box onto a screen large enough to be looked at by a theater audience. But, always the practical man, he made his invention available to the first outlet

which appeared. Beginning in 1892, "moving pictures" could be seen in places originally called Penny Arcades or Peep Shows, which soon became known as Kinetoscope Parlors.

The Kinetoscope Arcade, San Francisco, *c.* 1899. Penny arcades for a while also featured "Kinetophones" which enabled the spectator to hear music or "sound effects."

THE KINETOSCOPE

Penny arcades were for the poor and the young. They were storerooms with wide entrances decked with circus posters and lurid stills, forerunners of the garish movie advertising of later years. Phonographs had been installed in them early, and now sound and picture were crudely harnessed together to provide such naïvely comic or pornographic bits of life as "What the Bootblack Saw" or "How Bridget Served the Salad Undressed." (A trend manifested itself from the beginning: the risqué and slapstick were immediately popular, while "Surf at Dover" or "Beavers at Play" brought in meager returns.) To see these scraps of film, you dropped a penny in a slot, looked into an aperture like that of a stereoscope, and ground a crank. A light flashed on, and for a minute you watched Fatima wiggle her torso or a small boy squirt the garden hose on a well-dressed gentleman. You can see them today, in the flea circuses of the world, and now they are disarmingly redolent of an age of innocence. Then, they were glimpses of a far *less* innocent world than the poor and the young knew from their own experience.

The Kinetoscope was as far as Edison considered it expedient to take his new invention. Pleased with the flood of pennies that flowed in ~~from the peep~~ show parlors, he feared that if he were to project his images so that more than one person could see them at a time, the audience would soon be exhausted. But the pull of "living pictures" magnetized a host of would-be Edisons here and abroad. By 1895, the Kinetoscope had a lively imitative competitor in the Mutoscope, and strenuous efforts were being made by a score of mechanically minded men to combine the Kinetoscope principle with that of the magic lantern, so as to throw a larger-than-life-size picture on a sheet or on some other white surface.

Had any of the owners of the motion picture trust walked past the Crystal Hall on Fourteenth Street one day in 1914, they would have been confirmed in their contempt for the commodity they produced. The theater's poster artist had transformed – probably in all innocence – the Italian import *Tigress* to *Tigress, The Mysterious Criminal*.

THE NICKELODEON AND ITS PATRONS

In contrast to the small-town store shows, nickelodeons in New York and other big cities grew out of penny arcades in many cases, and they looked as dark, dirty, and smelly as penny arcades and flea circuses look to us today. Their first patrons were often tramps and drunks; the respectable shuddered away from them and murmured against them. It began to be said that something ought to be done about policing them or maybe banning them altogether. But the city nickelodeons thrived. Even more than in rural America, they were the only entertainment available to the poor.

Especially were they the chief entertainment of the hordes of immigrants from southern and eastern Europe who poured into the metropolis in the early 1900s. Barred from the theater by their ignorance of English, they could follow the one-reel picture dramas of the nickelodeons, learning much about American life and values in the process, and piecing out their English as they gradually related the subtitles to the action. Observing this, some of the more farsighted social workers of the period began to think that the despised "poor man's show" might become his university as well.

By the end of the Nickelodeon Age, even the city nickelodeons were safe and comfortable places which the most fastidious might (and some surreptitiously did) attend without offense. Exhibitors began to clamor for longer films with better stories and acting, knowing that audiences would pay more if they got more, but their clamor went unheeded. The real powers of the new industry, the producers, refused to believe that anybody

would ever shell out more than a nickel to see a movie. They didn't think the pictures they made were worth even a plugged one.

The New York Times ENCYCLOPEDIA OF FILM

Gene Brown, Editor

Harry M. Geduld, Advisory Editor

NYT
TIMES
BOOKS

* * *

BOSLEY CROWTHER, film critic of The New York Times, is the author of a forthcoming book that examines the origins of the movies.

[Ads Omitted In Printing]

ONWARD AND UPWARD – From its lowly beginning in a store, the 5-cent movie house progressed to this "high class" establishment on lower Third Avenue, which boasted "practically a two-hour show."

BEST AVAILABLE COPY

WHEN MOVIES WERE VERY YOUNG

Fifty years ago nickelodeons came into vogue, offering fifteen minutes of film for five cents.

By BOSLEY CROWTHER

THE glory, if such you can call it, of the old-time nickelodeon theatres – once as rampant in the realm of entertainment as television is today – will be fondly re-called and celebrated in ceremonies today. The occasion is the fiftieth anniversary of what legend holds to have been the opening of the first five-cent movie in Pittsburgh, Pa.

The "theatre" which inspired this celebration was actually a vacant store which two prominent Pittsburgh theatre owners, State Senator John P. Harris and Harry Davis, his brother-in-law, converted into a novel emporium where early silent movies were shown on a fifteen-minute rotating schedule at a nickel the customer.

This odd little place of entertainment, located at 433 Smithfield Street, next door to a penny arcade, was called the Nickelodeon, and was no more than a long, bare storeroom equipped with ninety-six folding chairs. An old phonograph played tinny music. The screen was a white linen sheet. And the films were such things as "The Baffled Burglar" and "Poor but Honest," which ran no more than a few minutes each.

This was the curious venture which legend holds to have been the first exclusively motion-picture theatre and the model of all the nickelodeons.

Legend is slightly inaccurate, as legend frequently is. Motion pictures were shown in tents and backrooms, in public halls and amusement parks, as independent entertainments, long before the opening of the Pittsburgh store. Old "Pop" Rock, one of the founders of Vitagraph, had a little nickel movie show that he operated down in New Orleans as early as 1896. And Tom Talley opened his first Electric Theatre, in which programs of primitive movies were shown, as an adjunct to a Los Angeles dime-museum as early as 1902. But the Pittsburgh venture of Harris and Davis came on the threshold of a great new trend. And it gave a name to the whole generic group of converted-store "theatres."

THIS sudden emergence of many nickelodeons, beginning in 1905, was a phenomenon in the world of entertainment that marked the real beginning of the "motion picture age." The primitive "flickers," derived from the inventions of the Lathams, Edison and the Lumieres, had been familiar for almost a decade as items on vaudeville-theatre bills. Here they had become so monotonous, after the first flush of their novelty, that they were regularly used to chase customers out of the theatres at the end of the shows.

Then a series of circumstances which began developing around 1905 brought on the wave of cheap showplaces that proved the movies to be the choice of the masses.

First, the discovery of the medium as a dramatic storytelling device with such crude but effective little dramas as "The Great Train Robbery," made in 1903, opened the way for the wooing of a new class of naïve

customers whose emotions were easily stimulated and whose pocketbooks were congenial to the 5-cent price.

Second, the great wave of immigration which hit this country from 1900 to 1910 was dumping into the cities fresh pools of potential customers for the brisk little picture dramas that required no language to be understood.

Third, the popular interest rose in a type of movie presentation called "scenic tours," which was nothing more than the showing of travel pictures in a place got up to look like a railroad car.

By 1907, it was calculated that there were between 2,500 and 3,000 nickelodeans in the United States, with the number increasing yearly. The "ingredients" needed for operation such as showplace, according to a trade paper, Motion Picture World, were "200-500 people (audience), phonograph (with extra large horn), woman cashier, electric sign, machine and operator and films, canvas screen, piano, barker, chairs." It was further remarked that the owner "needs a few brains and a little tact."

Immediately the popularity of the nickelodeans became apparent, various small business enterprisers and opportunists rushed into the field. Among them were such moving spirits as Adolph Zukor, William Fox and Marcus Loew, who were later to become great figures in the vastly expanding motion-picture industry.

Inevitably the guardians of the public weal came to view with alarm these upstart emporia. Within a couple of years of their emergence, religious and social leaders

were crying out against the perilous and corruptive influences of the nickelodeons.

The physically hazardous nature of many of these "store theatres," which were crammed into all sorts of buildings that were never designed for such things, increased their liability to charges. Occasional projection-machine fires and consequent stampedes of customers to get out of the crowded rooms caused periodic disasters, usually with fatalities. Cities soon invoked fire laws against them and compelled conformance to rules.

As a consequence of the angry question of the moral character of the pictures shown, the Peoples Institute in New York City was designated to inspect all the items made for the nickelodeons with an eye to stopping those thought morally harmful. Thus was established the precedent for the censoring of films.

The era of the nickelodeons lasted for roughly ten years. In that time, their vogue had penetrated to virtually every town in the United States. New York City had close to 700 5- and 10-cent movie places in 1908, which was the year in which Mayor George B. McClellan attempted to crack down on them.

But the slow passing of the nickelodeons was not entirely due to the objections of the moralists and the operation of fire and health laws. It was the consequence of the improvement in motion pictures, the increase in their length and costs and the ultimate necessity of larger and better theatres in which to seat a greater number of customers.

With the advent of the four and five-reel picture after 1912, the doom of the storefront theatre was sealed. Already the more advanced exhibitors, such as Loew and Fox, were picking up neighborhood legitimate theatres and old "family burlesque" houses in which to show films and vaudeville. The more elaborate motion pictures, such as Sarah Bernhardt's "Queen Elizabeth" and the Italian "Quo Vadis?", were opened in legitimate theatres on Broadway. The movies were becoming refined.

To be sure, nickelodeons lingered in certain spots for many years. But the expansion of the motion picture had made obsolete its original and novel homes.

• June 19, 1955

The New York Times ENCYCLOPEDIA OF FILM

Gene Brown, Editor

Harry M. Geduld, Advisory Editor

[LOGO]
Times
BOOKS

RETURN OF THE PEEP SHOW

HOLLYWOOD

The efforts of the cinema to be recognized as a member of the aristocracy apparently have been in vain. In recent weeks mechanical developments have occurred that threaten to throw the medium back to its nickelodeon source. The most feverish activity in Hollywood at the moment centers in the nickel-in-the-slot picture machines for bars and pool rooms. It looks as though the

foundation laid by "The Birth of a Nation" and "Gone With the Wind" is crumbling.

At least a half-dozen concerns are preparing devices to wheedle nickels out of saloon patrons. James Roosevelt was the first to announce his interest in the new business when he revealed his association with the Mills Novelty Company of Chicago. This week Phonovision made its appearance, sponsored by Frank Orsatti, head of one of Hollywood's more formidable talent agencies; Sam Sax, formerly of Warners, and Sollie Freedman. The report is that the concern has Warner and Metro money in it. Four other firms are known to be in the process of organization, the latest to come into the open being Phonofilm, which is credited with having the backing of Bell & Howell, the camera manufacturers.

Those promoting the devices, which will play music and show motion pictures at the same time, anticipate fantastic profits from the machines. There are an estimated half-million phonographs operating on the serve-yourself basis in bars, lunch rooms and pool halls in the United States. The movie people expect to displace most of them because they give so much more for the money. Imagine being able to see Benny Goodman as well as hear him! It's practically unbelievable. The promise of profits is so great that vast sales organizations are being formed to sweep across America and place the devices in every drinking emporium in the land. With their success, that day can be envisioned when an inebriate, under great emotional stress, will sob on the barkeep's shoulder, "But I don't want Hedy Lamarr; I want a beer."

The slot-machine films have caused Roosevelt to revise his production plans. His Globe company will be devoted to making 16 mm. subjects for the automatic devices, while his feature activities will be merged with those of Samuel Bronston Productions, of which Bronston is president and Roosevelt is chairman of the board. Their first offering will be "The Bat." This merger of two concerns which have not yet entered production will give Roosevelt added capital and Bronston a United Artists release which he did not have.

When Roosevelt's connection with the slot-machine business was first announced he was to be a partner in the Mills venture as well as producer of the pictures. Now he has withdrawn from the mechanical division and will limit his activities to picture making.

While production of the projectors has not yet reached a commercial basis, a few are in operation in Hollywood cocktail lounges, and the Orsatti Company has a number of its Phonovisions on display in its offices. They are huge and gaudy devices, with plastic cases through which colored lights blaze when they are not in operation. The shells resemble vast gramaphones with the projection machine at the base shooting into a mirror on the rear panel. By a series of reflectors the image is carried to the top of the machine, where it has been enlarged to fit a screen approximately twelve by eighteen inches. The film is on a continuous loop which is taken off a loosely wound reel and replaced after it has been projected.

There are ten subjects to the reel, each subject lasting three minutes. With the machine in continuous operation

this permits a maximum revenue of $1 an hour. The makers estimate that the film costs 1½ cents a foot to manufacture and distribute. In speculating on the entertainment possibilities of the device, Freedman says that the machine can be located in such a way that through mirrors set about a barroom the image may be visible in every booth.

* * *

Whether the Hays Purity Code will be invoked is a moot point. One subject now on display in a Hollywood bar deals with a strip tease number and it is unlikely that this would be given the Hays propriety seal. Such a subject, however, has great revenue-producing possibilities, for, placed in the middle of a reel, it is necessary to fill the machine with nickels again before the lady's performance can be witnessed a second time.

D. W. C.

• April 21, 1940B

[Ads Omitted In Printing]

The New York Times
ENCYCLOPEDIA OF
FILM

Gene Brown, Editor

Harry M. Geduld, Advisory Editor

NYT
Times
BOOKS

May 1941

* * *

[Ad Omitted In Printing]

THE HOLLYWOOD ROUND-UP

By DOUGLAS W. CHURCHILL

HOLLYWOOD

* * *

Although the anticipated boom in nickle-in-the-slot movies failed to materialize, the business is developing, albeit slowly, and this week a new concern, Etienna Noir Productions, displayed its wares. This latest contribution consists of a two-color job under the title of Majorettes and they tell more of a story in the three minutes they are on display than any of the others. From a production standpoint, Noir says, he has had advantage for he shoots directly on 16-mm. film while James Roosevelt and the others use 35-mm. and reduce it.

While every one is vague about actual figures, it is probable that there are 1,500 machines in operation in America today. It was predicted when the devices were

launched that by this time the number would be many thousands. They are made by a half dozen firms. Lack of product rather than a shortage of projection machines is given as the reason for retarded development of the field.

The cost of the juke box movies runs from $1,000 a subject for Majorettes to $2,300 for the Roosevelt offerings. A reel of eight subjects rents for approximately $50 for six weeks, which is as long a run as can be expected. There have been no smash hits yet in the slotties, although one subject, "The Man Who Comes Around," has shown above average popularity in some districts; it's sort of off color. Taxes have been levied on the machines where ever they have shown popularity, with New York exacting the highest, $2 a month a box.

• May 18, 1941

[Proof Of Service Omitted In Printing]

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California Corporation; *et al.*, plaintiffs, v. CITY OF LOS ANGELES, a municipal corporation, defendant.	Case No. CV 95-7771 DDP (CTx) **DECLARATION OF STEVEN D. WIENER IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT** Hearing: Date: August 25, 1997 Time: 10:00 a.m. Ctrm: 24

DECLARATION OF STEVEN D. WIENER

(28 U.S.C. § 1746)

I, Steven D. Wiener, hereby declare as follows:

1. I am, and at all times have been, the president of plaintiff Highland Books, Inc., and also of plaintiff Alameda Books, Inc. I make this declaration in support of

those plaintiffs' Motions for Summary Judgment. Except to the extent stated otherwise, I have personal knowledge of all statements made herein.

2. Plaintiff ALAMEDA BOOKS, INC., is a corporation, organized and existing under the laws of the State of California. It owns and operates an "adult" book and video store by the name of "Alameda Books", Unit 101, located at 1901 S. Alameda, in the City of Los Angeles, Los Angeles County, California. Alameda Books is not located within 1,000 feet of any adult entertainment business nor within 500 feet of any religious institution, school, public park, nor any agricultural or residential zone. It is also located in a proper zoning district in the City of Los Angeles for that type of use.

3. Plaintiff HIGHLAND BOOKS, INC., is a corporation, organized and existing under the laws of the State of California. It owns and operates an "adult" book and video store by the name of "Highland Books", located at 6775 Santa Monica Blvd., in the City of Los Angeles, Los Angeles County, California. Highland Books is not located within 1,000 feet of any adult entertainment business nor within 500 feet of any religious institution, school, public park, nor any agricultural or residential zone. It is located in a proper zoning district in the City of Los Angeles for that type of use.

Unitary Nature of Stores

4. Both Highland Books and Alameda Books are relatively small retail stores. The area of the portion of Alameda Books which is open to the general public is approximately 3,000 square feet. The area of the portion

of Highland Books which is open to the public is approximately 2,500 square feet.

5. Both stores sell non-obscene sexually-oriented books, magazines, videotapes and sexual accessories and novelties. Additionally, both stores rent all of the videotapes otherwise on sale at each store.

6. Within both stores, there are also a number of booths, described in more detail later herein, wherein a customer can view sexually-oriented videotapes.

7. The method of operation of the two stores is virtually identical. During most of the hours while the store is open, there is but a single employee in the store, a counter clerk who rings up retail sales and supervises operation of the store's video viewing booths. That employee also gives change and checks identification to ensure that no minors gain access to sexually-oriented materials. At certain times of the day, each store will also have a person on clean up detail who also acts in the capacity of a security guard.

8. Both Highland Books and Alameda Books are unitary businesses in every relevant sense of the word. The video viewing booths and retail sales occur in the same commercial space within a single building. In Alameda Books, there are no walls separating the video viewing booths from the retail portion of the premises. In Highland Books, the video booths are in the same store as the retail sales, but in a somewhat separated portion of the store connected to the retail sales by a common and open interior entrance way. In both stores, one manager (or clerk) supervises the entire location. There is only one entrance/exit door (not counting any emergency exits) to

the entire store. Customers must go through this main entrance to get to either the video booths or the retail sales areas of the store. Customers may freely walk about the premises entering and exiting the video viewing booths and browsing through the store.

9. Both Highland Books, Inc. and Alameda Books, Inc., are the sole owners of each respective business in question, including both the retail sales and rental aspects of the stores as well as the video arcade portion of the store. The income from these stores' retail sales and from their video viewing booths all goes exclusively to their corporate owner and is not distinguished in any way other than for internal accounting purposes. In every standard commercial sense, both Highland Books and Alameda Books are but a single business each, notwithstanding the fact that the City of Los Angeles ("the City"), by ordinance, has chosen to artificially define their businesses as each constituting more than one adult entertainment "business."

10. The City has threatened both Highland Books and Alameda Books with enforcement of the criminal provisions of L.A.M.C. § 12.70C which prohibit operating more than one adult entertainment "business" within the same building or business. Specifically, on March 15, 1995, a City building inspector issued Order to Comply No. 06864 to Alameda Books, Inc., in care of its attorney, Norman Atkins, stating that it was violating the portion of L.A.M.C. § 12.70C prohibiting the operation of more than one adult entertainment business in the same building. A true copy of that order is attached hereto as Exhibit A. I am further informed that the City thereafter decided to initiate a criminal prosecution against

Alameda Books for that same violation but that it had failed to file such lawsuit prior to the issuance of a preliminary injunction in the present federal action. Because of those threats, both Highland Books, Inc. and Alameda Books, Inc. concluded, to their great surprise, that notwithstanding the City's settlement with numerous adult businesses in the *Topanga Press* litigation, it had decided to prospectively resume enforcement of this same multiple use prohibition against *other* adult businesses. For that reason, both plaintiffs herein reasonably feared criminal prosecutions and joined as plaintiffs in the present lawsuit.

FIRST AMENDMENT ISSUES

Nature of "Arcade" Use

11. Alameda Books has 12 multi-channel video viewing booths. It also has three video preview booths. Highland Books has sixteen multi-channel video booths and three video preview booths.

12. In both stores, each multi-channel video booth provides the customer with an average of 60 different channels of videos which may be viewed if the customer places a dollar bill into the machine. The customer may then browse from channel to channel until a timer terminates the operation of the machine. After a customer has watched the videos of his or her choice in the multi-channel video booths, the customer can then go to the clerk on duty and purchase any of the videos showing in the multi-channel booths. In this way, customers can

browse a wide variety of videos in a relatively inexpensive manner and then make their selections concerning which videotapes to ultimately rent or purchase.

13. The video preview booths work more directly in conjunction with the retail video tape sales and rentals portion of the store. In Alameda Books, the store carries approximately 6,500 different sexually oriented videotapes for rental or retail sale. At Highland Books, the store also carries approximately 6,500 different sexually oriented videotapes for rental or retail sale. Both stores utilize video preview booths in a similar manner. Specifically, if a customer should happen to see a videotape on one of our shelves that may be of particular interest, but which is not available for viewing on one of the 60 different channels in the multi-channel video booths, that customer can then bring the videotape directly to the counter clerk and request to preview that specifically chosen videotape. After paying a small fee to the counter clerk, the customer is then directed to one of the video preview booths where the clerk activates the necessary machinery to allow the customer to view that videotape. Following the viewing of the tape in the preview booth, the customer may, and frequently does, elect to either purchase or rent such tape for subsequent home viewing.

14. At all relevant times, there has existed in both Highland Books and Alameda Books a prominently displayed commercial sign which, in pertinent part, states the following to all customers:

> "ALL VIDEOS IN THIS STORE ARE AVAILABLE FOR RENT, PREVIEW, AND/OR SALE. A CASH, VISA OR MASTERCARD DEPOSIT

> EQUAL TO THE PRICE OF THE VIDEO IS REQUIRED."

15. It is ā regular occurrence in both Highland Books and Alameda Books that customers who have viewed a videotape either in one of the multi-channel video viewing booths or in one of the video preview booths will, before leaving the store, proceed to either rent or purchase one of the videos that they have just previewed.

16. It is my understanding that the operation of *either* video preview booths *or* dedicated multi-channel video viewing booths would both, independently, cause a store to be characterized as an "adult arcade" within the meaning of the definitional sections of Los Angeles's adult entertainment zoning ordinance. Moreover, to the extent that any store containing either multi-channel video viewing booths or video preview booths would also offer to sell or rent such adult videotapes to their customers, such a store would also be characterized by the City as an "adult bookstore." Accordingly, if this ordinance is upheld, then there would be nowhere in Los Angeles where one could establish an adult bookstore and allow its customers the option of previewing a sexually-oriented videotape before deciding to rent or purchase it.

17. I have been involved in the management of adult bookstores for at least 15 years. In the many years in which I have been involved in this industry, I have never heard of a business which maintained or operated motion picture or video viewing booths as a primary use except in conjunction with retail sales of related media

materials, such as adult books, magazines, films or videotapes. Adult arcades have existed as primary uses, if at all, within adult bookstores as a single business under one roof. Moreover, I am familiar with the adult bookstore industry not only within Los Angeles County, but also within the entirety of California and the nation as a whole. It is my experience that throughout the entire country, there is no such thing as an "adult arcade" which exists as either an independent business or a primary use unrelated to any retail sales of adult materials. In short, there simply *is* no such thing as an "adult arcade business" which exists in the real world independent of that which the City defines as an "adult bookstore."

18. Based upon my many years of managing the operation of adult bookstore businesses, I have also developed substantial expertise in understanding the economics of this type of business. It is my opinion that an adult bookstore has a significantly greater chance of succeeding and remaining in operation if, as a part of its business, it operates an adult arcade. Similarly, it is my opinion that an adult arcade has a significantly greater chance of succeeding and remaining in operation if such business operates within an adult bookstore. In making these statements, it is my intent neither to endorse nor reject the entirely separate proposition of whether either such business *could* in fact theoretically survive except as operated in tandem with the other. I have been informed by my lawyers that this latter issue, by prior agreement with the City, is one upon which we will not present evidence.

19. In sum, it is my opinion that if the City is allowed to enforce its prohibition on so called "multiple

use" adult businesses, the public will be deprived of any opportunity to view or preview sexually-oriented videotapes prior to the purchase or rental of such videotapes. It is my belief that this would deprive the public of significant and valuable information rights which it presently both enjoys and exercises.

Secondary Effects

20. As one who has observed and been involved in the operations and management of adult bookstores for 15 years, I am aware of no legitimate interests the City could possibly have in preventing adult arcades from operating in conjunction with retail sales or rentals of video tapes in the same commercial space, given the extensive restrictions that already apply to such businesses. Such restrictions include not only special lighting requirements and requirements that there be no doors on the viewing booths (so as to insure the visibility of the patron using the booth), but also special zoning restrictions which require that adult arcades (as well as adult bookstores) be in proper zones, and also be at least 1,000 feet from any other adult business (as defined by the City's Municipal Code) and at least 500 feet away from any religious institutions, schools, public parks or residential zones. It is my belief that the existing restrictions on adult arcades and adult bookstores are more than sufficient to accomplish any conceivably legitimate municipal interests. I cannot imagine what further municipal purpose would be served by prohibiting properly zoned adult arcades from operating from within a properly zoned adult bookstore. The only conceivable purpose

would appear to be the attempted destruction of the adult arcade industry.

EQUAL PROTECTION ISSUES

21. Both Alameda Books and Highland Books commenced operating (i.e. first opened their doors to the public) at some time *after* January 23, 1984, the effective date of Los Angeles Ordinance No. 158,579. To the extent that ordinance may apply to the operation of these businesses, it is my understanding that these businesses have no statutory grandfather status under that ordinance.

22. I am now and at all times have been president of Beverly Books, Inc., the owner and operator of Le Sex Shoppe. Moreover, subsequent to January 23, 1984, I purchased controlling shares in both Whitey, Inc., and Hardrock, Inc., the respective owners and operators of Big Apple Bookstore and J&B Books and, at all times since I took over such controlling interest, I have been the President of both of those corporations.

23. As discussed in more detail below, Beverly Books, Inc., Whitey, Inc. and Hardrock, Inc. were plaintiffs in a lawsuit against the City of Los Angeles challenging, among other things, the constitutionality of the City's ordinance prohibiting multiple adult uses in the same building. That lawsuit was filed under the name *New Wave, Inc., et al. v. City of Los Angeles*, U.S.D.C. C.D.Cal No. CV 91-0689 and was one of the seven cases consolidated in the *Topanga Press* litigation.

24. After District Judge Gadbois had issued a preliminary injunction preventing the City from enforcing,

among other things, that particular ordinance, the case ultimately was settled in a settlement agreement pursuant to which the City agreed that it would permanently cease enforcing, among other things, the multiple use prohibition of L.A.M.C. § 12.70C against these three businesses in return for their agreement to drop the merits of their constitutional claims against it. I am unfamiliar with any suggestion that the City ever entered into that settlement based upon any conceivable notion that the stores of Beverly Books, Inc., Whitey, Inc. or Hardrock, Inc. constituted so called "replacement stores" for other previously lawfully operating stores that any of them were voluntarily abandoning. Moreover, and more to the point, the City could not rationally have come to such a conclusion as neither Beverly Books, Whitey, Inc. or Hardrock, Inc. had abandoned any lawfully operating adult bookstores in return for the City's agreement to enter into the stipulated permanent injunction on their behalf in the *Topanga Press* litigation. So that the specific facts involving each of these three stores will be clear, I have set forth below, to the best of my recollection, the dates when each of these three corporations acquired their respective businesses, as well as the relative time frames when they were first operated as so called "multiple use" adult entertainment businesses.

25. Beverly Books, Inc. acquired Le Sex Shoppe from an unrelated entity long after January 23, 1984. At the time Beverly Books, Inc. acquired Le Sex Shoppe, that business had previously been operating as a so called "dual use" adult bookstore, consisting of both retail sales and an adult arcade, and I had been informed it had been

so operating since prior to September 1, 1978. Accordingly, it had originally been *my* belief that Le Sex Shoppe was a "grandfathered" business (i.e., a lawful non-conforming use) with respect to the ordinance's "multiple use" prohibition and, as a result, when Beverly Books, Inc. first took over that store, it continued to operate Le Sex Shoppe as a "multiple use" adult bookstore. However, City officials *rejected* our contention that the ordinance provides grandfather status from its "multiple use" prohibition where a grandfathered owner sells or transfers its business to a new owner, and threatened to enforce the "multiple use" prohibition of L.A.M.C. § 12.70C against Beverly Books, Inc. As a result, it was necessary for Beverly Books, Inc. to be joined as plaintiff in the portion of the *Topanga Press* litigation challenging the City's multiple-use prohibition.

26. As noted above, I acquired Whitey, Inc. (the owner of Big Apple Bookstore) from an unrelated entity long after January 23, 1984. Because it was my understanding that the prior corporate owner did not have any "grandfather" status entitling it to operate so called "multiple" adult uses on the premises, Big Apple Bookstore did not, at least initially, attempt to operate the store as a so called "multiple-use" adult business. Rather, from the date I acquired Whitey, Inc. until approximately June of 1991, Big Apple Bookstore attempted to operate as a non-adult bookstore (which did sell some adult items, but less than a preponderance of its inventory was "adult") along with an adult arcade. However, because this was a highly inefficient and ineffective way of operating, Whitey, Inc. joined as one of the plaintiffs in the *Topanga Press* litigation who challenged the City's multiple use

prohibition. In 1991 in response to developments in the *Topanga Press* litigation, Whitey, Inc., as a plaintiff therein, announced to the court that it was, from that point forward, converting (and did in fact so convert) such that a preponderance of its retail inventory would be of so called "adult" materials.

27. As noted above, I acquired Hardrock, Inc. (the owner of J&B Books) from an unrelated entity long after January 23, 1984. Immediately prior to the time Hardrock, Inc. first acquired J&B Books, that store had been operating multiple so-called adult business activities. I do not know whether it was doing so as a lawful non-conforming use or as an unlawful non-conforming use, though I had initially assumed the former. While Hardrock, Inc. initially continued the pre-existing multiple adult uses, City officials informed us that they considered such use to be in violation of the ordinance's multiple use prohibition and, as a result, J&B Books attempted to operate as a non-adult bookstore (which did sell some adult items, but less than a preponderance of its inventory was "adult") along with an arcade. As was the case with the Big Apple Bookstore, J&B Books also found it highly inefficient and ineffective to operate in that manner and, accordingly, eventually joined as one of the plaintiffs in the *Topanga Press* litigation challenging the City's multiple use prohibition. In 1991 in response to developments in the *Topanga Press* litigation, Hardrock, Inc., as a plaintiff therein, announced to the court that it was, from that point forward, converting (and did in fact so convert) such that a preponderance of its retail inventory would be of so called "adult" materials.

28. Currently, Le Sex Shoppe, Big Apple Bookstore, and J&B Books each predominately sell adult materials, including videotapes, and exhibit adult videotapes in multi-channel viewing booths and preview booths.

29. To reiterate, I gave my approval to the settlement agreement which was entered into in the *Topanga Press* litigation between Beverly Books, Inc., Whitey, Inc., Hardrock, Inc., and the City of Los Angeles, pursuant to which the City conferred permanent lawful nonconforming use status upon those three businesses in connection with the multiple use prohibition of L.A.M.C. § 12.70C. At no point did the City suggest to me that it was entering into the settlement agreement because it perceived that any of these three stores was a "replacement" store for any other store I had owned that had voluntarily gone out of business. Moreover, that would not have been true in any event because neither I nor any of these three corporations ever owned any other stores which were voluntarily relinquished in order to facilitate the signing of the settlement agreement in the *Topanga Press* litigation.

30. I know of no factors whatsoever which would distinguish the operation or history of Beverly Books, Inc., Whitey, Inc., and Hardrock, Inc., on the one hand, from the operation and/or history of Alameda Books, Inc, or Highland Books, Inc. on the other hand, nor that would justify providing permanent lawful nonconforming use status for the former groups of businesses but denying it to the latter.

VAGUENESS/OVERBREADTH ISSUES

31. Should this court uphold the ordinance's "multi-use" prohibition on adult businesses against both our First Amendment and Equal Protection challenges, I would then have no choice but to attempt to convert the retail sales portions of both Alameda Books and Highland Books such that they would no longer be categorized as "adult" bookstores but, nonetheless, such that they would carry the *maximum* amount of "adult" sexually oriented materials consistent with a designation of such stores as *non*-adult bookstores. For example, there are hundreds of video stores in the greater Los Angeles area of which I am aware which contain substantial portions of their inventory consisting of adult sexually oriented videotapes, even though the majority of their videotapes are "non-adult." It is my understanding that the city does *not* attempt to enforce its adult zoning restrictions against *most* such businesses within its jurisdiction.

32. However, I have been informed by my attorneys that whenever an "adult" bookstore attempts to convert to a "non-adult" bookstore carrying some small amount of "adult" materials, the city has uniformly refused to supply it with any clear guidelines which can help it achieve compliance with the city's zoning requirements. I am also informed that even if virtually all adult retail materials are removed from such stores, the City will continue to characterize such stores as an "adult bookstore" even though only a very small percentage of its inventory or titles may in fact consist of "adult" inventory. Moreover, I am informed and believe that the city has taken particularly arbitrary and inconsistent positions in enforcing these provisions against businesses it

contends are "adult bookstores" and that it will never provide any consistent or binding guidelines for achieving compliance. For these reasons, should this Court reject plaintiffs' First Amendment and Equal Protection challenges, plaintiffs' two stores would not be able to safely carry *any* meaningful amount of retail adult materials (even though they would *want* to) because the ordinance is too vague to provide them with notice of how to achieve compliance while retaining the maximum permissible amount of "adult" materials. In short, because of the vagueness of the multiple use prohibition of the ordinance, we would be chilled and deterred from selling *any* meaningful amount of adult materials.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of June, 1997, within the United States of America.

/s/ Steven D. Wiener
STEVEN D. WIENER

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California Corporation; *et al.*, plaintiffs, v. CITY OF LOS ANGELES, a municipal corporation, defendant.	Case No. CV 95-7771 DDP (CTx) **DECLARATION OF G. RANDALL GARROU IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT** Hearing: Date: August 25, 1997 Time: 10:00 a.m. Ctrm: 24

DECLARATION OF G. RANDALL GARROU

(28 U.S.C. § 1746)

I, G. Randall Garrou, hereby declare:

1. The following statements are true of my own personal knowledge. If called upon, I could and would testify to the following.

2. I represent plaintiffs ALAMEDA BOOKS, INC. and HIGHLAND BOOKS, INC. in the above-captioned litigation.

3. I have represented adult bookstores in the City of Los Angeles for in excess of twenty years and am well familiar with a variety of forms of ordinances which the City has used to regulate these businesses.

4. One of the most significant methods by which the City regulates these businesses is through the tool of zoning. An adult entertainment business wishing to open in Los Angeles must comply with a wide variety of zoning requirements. Pursuant to the requirements of Los Angeles Municipal Code (hereinafter "L.A.M.C.") § 12.70C, no adult business may locate in an agricultural or residential zone, nor within 500 feet of any such zone. Neither may an adult entertainment business locate within 500 feet of a church, school or park. Neither may an adult entertainment business locate within 1,000 feet of any other adult entertainment business.

5. In addition to the special zoning restrictions of L.A.M.C. § 12.70C described above, all adult entertainment businesses must additionally comply with all generally applicable zoning requirements for such businesses. For example, while adult bookstores are permissible in the C-2 and C-4 commercial zones, adult cabarets are expressly prohibited from operating in the C-4 commercial zones and the City has consistently interpreted its zoning code such that adult arcades are also prohibited in such zone.

6. The City also imposes additional operational restrictions upon adult arcades, defining them as "picture arcades" subject to regulation under L.A.M.C. § 103.101. These regulations include, among other things, restrictions establishing a minimum level of illumination in such booths, as well as requirements that no video viewing booth may have a door on it and that the interiors of such booths must be visible at all times to persons outside the booth.

7. I am also well familiar with the legislative history that the City has relied upon in enactment of its various adult zoning restrictions. I am not familiar with any piece of legislative history where the City has indicated the existence of any secondary effects caused by the *combination* of the retail sale of adult items and the exhibition of adult videotapes, as distinct from any secondary effects attributable to either individual use.

8. I have also read the City's original studies which led to its enactment in 1978 of its original adult zoning ordinance and that study, which had attempted to summarize all of the then-existing adult businesses in Los Angeles, made no mention of any business which existed simply as an adult arcade independent of any adult bookstore. To my knowledge, the City has never had any reason to believe that there has ever even *been* such a thing as an adult arcade which was not operating inside an adult bookstore.

9. In prior litigation with the City of Los Angeles in which I have been involved, the City has consistently taken the position that it was the legislative intent of the

City Council in enacting the so-called multiple use prohibition of L.A.M.C. § 12.70C, to prevent the very types of businesses operated by these plaintiffs, i.e., typical adult bookstores which include video viewing booths.

10. In my experience, the overwhelming majority of adult bookstores in Los Angeles have operated with motion picture or video viewing booths. In my experience, no adult arcades have ever existed in Los Angeles which were not inside of adult bookstores.

11. I am not familiar with any commercial businesses in the entire nation which operate such that an adult arcade is their sole or principal use. For this reason, it is my belief that the City of Los Angeles' attempt to create restrictive zoning for all "adult arcade" "businesses" is not aimed at any businesses existing in the real world but, instead, is simply a device *masquerading* as a content-neutral zoning tool, but which is in fact designed for the sole purpose of essentially preventing adult bookstores from allowing on-premises viewing of adult video tapes.

12. I am familiar with all of the City of Los Angeles' ordinances regulating adult arcades and adult bookstores. It is my opinion that, given the existence of the multiple use prohibition of L.A.M.C. § 12.70C, the effect of this restriction, if the City is allowed to enforce it, will be to eliminate all practical opportunities for members of the public to view or preview sexual oriented videotapes prior to making an on-site decision of whether to purchase or rent such videotapes. As a practical matter, no reasonable retailer of such videos would allow the free

previewing of such videos in their store as their businesses would be inundated and destroyed by virtually hordes of freeloaders who would simply view such tapes for free with no intention of making any subsequent rental or purchase.

13. Based upon my experience with the adult entertainment industry generally, I am aware that, for the vast majority of videotapes sold in adult bookstores, there is no secondary source by which a potential customer may gain familiarity with the contents of most of these videotapes other than by previewing them in the store where they are offered for sale or rental. Most of these videos are not so popular that it is likely their contents will have been written up in magazine summaries or other sources by which the public can frequently acquaint itself with the contents of more mainstream videos prior to deciding to rent or buy them.

EQUAL PROTECTION ISSUES

14. I was the lead counsel for plaintiffs in seven separate lawsuits consolidated under the title *Topanga Press, Inc., et al. v. City of Los Angeles*, C.D. Cal. No. CV 88-7838 RG, 989 F.2d 1524 (9th Cir. 1993) (*"Topanga Press"*). All 22 plaintiffs in those seven consolidated cases challenged the constitutionality of the residential proximity restrictions of Los Angeles Municipal Code ("L.A.M.C.") Section 12.70C, and approximately half of those plaintiffs additionally challenged the constitutionality of a portion of L.A.M.C. § 12.70C which prohibited operating more than one adult entertainment

"business" in the same building or commercial space (the "Prohibition").

15. Three of the plaintiffs who challenged the Prohibition were Beverly Books, Inc., (which operated Le Sex Shoppe at 5507 Hollywood Boulevard in Los Angeles), Whitey, Inc. (which operated Big Apple Bookstore at 10654 Magnolia Boulevard in Los

* * *

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California corporation, and HIGHLAND BOOKS, INC., a California corporation, Plaintiffs, vs. CITY OF LOS ANGELES, a municipal corporation, Defendant.	CASE NO. CV 95-7771 DDP (CTx) **DEFENDANT CITY OF LOS ANGELES' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT DETERMINING THE UNCONSTITUTIONALITY OF THE "MULTIPLE USE" PROVISION OF L.A.M.C. § 12.70 C BASED ON THE FIRST AMENDMENT, EQUAL PROTECTION, AND VAGUENESS AND CONSEQUENT SUBSTANTIAL**

) **OVERBREADTH;**
) **DECLARATIONS OF JAMES**
) **L. BANGHAM, PETER**
) **NELSON KING, MICHAEL L.**
) **KLEKNER, AND SHARON**
) **SIEDORF CARDENAS**
)
) Date: September 22, 1997
) Time: 10:00 a.m.
) Place: Courtroom 24
) (Filed Aug. 18, 1997)
)

DECLARATION OF PETER NELSON KING

I, Peter Nelson King, the undersigned declare that:

1. I am an attorney at law, duly licensed to practice before all the courts of the State of California and I am admitted to practice in the United States District Court, Central District. I am a Deputy City Attorney and am one of the attorneys representing the City of Los Angeles in the matter herein. My business address is 1700 City Hall East, 200 North Main Street, Los Angeles, California, 90012. I am familiar with the contents of the referenced case files and the documents contained therein.

2. If called upon, I could and would competently testify to the matters set forth herein which are a matter of personal knowledge.

3. I was the attorney of record who handled all aspects of the litigation entitled *E.W.A.P., Inc. v. City of Los Angeles*, Case No. CV 95-1711(AWT) and *Steven A. Diamond and Diamond Video World, Inc. v. City of Los Angeles*, Case No. CV 95-1534 (AWT) referred to in the Complaint

of Plaintiffs Alameda Books, Inc. and Highland Books, Inc. on page 8, ¶ 26 and page 9, ¶ 29.

4. The case entitled *E.W.A.P., Inc. v. City of Los Angeles*, Case No. CV 95-1711(AWT) was filed March 17, 1995, challenging the 1,000 foot separation requirement between adult businesses required by Los Angles Municipal Code, Section 12.70C. Mr. David M. Brown (deceased) represented plaintiffs, E.W.A.P., Inc. in this case.

5. The case entitled *Steven A. Diamond and Diamond Video World, Inc. v. City of Los Angeles*, Case No. CV 95-1534 (AWT) was filed March 13, 1995, challenging the same 1,000 foot separation requirement. Mr. Roger Jon Diamond represented plaintiffs, Steven A. Diamond and Diamond Video World.

6. The issues in these two matters were similar in nature and the owners in both instances had been cited by enforcement personnel for operating two adult businesses (an adult bookstore and an adult arcade as defined by L.A.M.C. § 12.70 B 17) at one location in violation of LAMC § 12.70C. Therefore a Notice of Related Case dated March 21, 1995, was sent to the United States District Court, Central District. The cases thereafter were processed simultaneously before Judge A. Wallace Tashima.

7. During settlement discussions with both Mr. Brown and Mr. Diamond, I made it clear that the City was not interested in settling any cases wherein there was a violation of the separation requirement set forth in LAMC § 12.70C for new adult establishments.

8. Mr. Brown, nevertheless, proposed settlement of the *E.W.A.P., Inc.* case based upon the fact that the two

adult uses occurring at the location were not new uses but, in fact, had been in existence prior to the enactment of LAMC § 12.70, the City's Adult Entertainment Zoning Ordinance, which became effective on September 1, 1978. He also pointed out that this business had been "grandfathered" as part of the settlement in the *Topanga Press v. City of Los Angeles* litigation, Case No. CV 88-7838. He confirmed the date the business was established and further stipulated as part of the settlement that his client would not attempt to establish any two *new* adult uses at one location in the future. (See letter from David M. Brown dated July 10, 1995, with enclosure, attached hereto as Exhibit "18".)

9. Mr. Diamond thereafter requested that the City of Los Angeles also consider settlement of the lawsuit with Diamond Video World on the same basis i.e. that the two adult uses at one location predated the effective date of LAMC § 12.70. During the settlement discussions with Mr. Diamond, he represented to me that his client was operating an adult bookstore and an adult arcade as had the previous owner(s) at that location. The attached newspaper article that I received confirmed that what Mr. Diamond was saying appeared true; that is, that a preexisting adult bookstore and arcade business had been in operation at the location which predated the effective date of the 1978 Adult Entertainment Zoning Ordinance. (See LA Daily News article entitled *City Sued Over Adult Store Rule* by Rick Orlove, attached hereto as Exhibit "19".)

10. The belief of the parties regarding the possibility of "grandfather" status in regard to Diamond Video World was reflected in the document entitled "Joint

Report Of Early Meeting Of Counsel" which was first filed in the *Diamond* case on April 21, 1995. (See "Joint Report Of Early Meeting Of Counsel," attached hereto as Exhibit "20".)

11. I was thereafter required by law to convey both settlement proposals to my client, the City of Los Angeles. I did so by sending confidential letters entitled: "Settlement Offer – E.W.A.P. v. City of Los Angeles" and "Settlement Offer – Diamond Adult [sic] Video World v. City of Los Angeles" to the City Council.

12. On September 13, 1995, I went into a closed executive session with the City Council pursuant to Government Code § 54956.9 (a) to consider in good faith the proposed offers to settle on both matters. The City Council accepted both offers of settlement.

13. Plaintiffs Alameda Books, Inc. and Highland Books, Inc. are not in the same class as the businesses in *E.W.A.P.* or *Diamond*. The present plaintiffs were established long after the effective date of LAMC § 12.70 and, in particular § 12.70 C – the "multiple use" provision. And, thus far, neither business has represented through its counsel that it was a replacement business, part of the aforementioned *Topanga Press* case, or that it was established prior to the enactment of Ordinance No. 157,538. In fact, the plaintiffs in the current case have alleged that they are *not* entitled to "grandfather status". (Complaint ¶ 33.)

14. As one of the attorneys representing the City in the present litigation, I was responsible for handling the discovery aspect of this case. I had caused to be sent to the plaintiffs a set of written interrogatories regarding the

financial aspects of both plaintiffs businesses. Rather than answer those questions, plaintiffs proposed that they "will be hereafter barred from **asserting** in this case the proposition that no adult arcade can survive economically, unless it operates in conjunction with an adult bookstore on the same premises." (Emphasis added.) In confirmation of the above agreement G. Randall Garrou, the attorney for the plaintiffs, sent me a letter dated April 16, 1997. (See letter dated April 16, 1997, from G. Randall Garrou, attached hereto as Exhibit "21".)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 13, 1997, at Los Angeles, California.

/s/ Peter Nelson King
PETER NELSON KING
Deputy City Attorney

EXHIBIT 21

LAW OFFICES
WESTON, GARROU & DEWITT
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

[Names And Addresses Omitted In Printing]

April 16, 1997

TRANSMITTED ON THIS DATE BY TELEFAX TO (213) 485-8899; ORIGINAL SENT TODAY BY MAIL.

Peter Nelson King
Deputy City Attorney
18th Floor, City Hall East
200 N. Main Street
Los Angeles, CA 90012-4131

re: *Alameda Books, Inc. v. City of Los Angeles,*
U.S.Dt.Ct. C.D. Cal. No. CV 95-7771 DDP
Summary of Discovery Agreement reached on January 29, 1997

Dear Mr. King:

This letter will confirm the substance of our telephone conversation today in which the following occurred: (1) I indicated I had read through the proposed discovery stipulation which you recently sent me and wanted to discuss with you a number of modifications of the stipulation that we thought were necessary; (2) you indicted that you did not then have time for a detailed analysis of the terms of the stipulation but that you would call me back when your schedule cleared so we could discuss the same; (3) you requested, and I agreed, that I would provide you with a simple statement in a letter indicating our clients' position that will be taken at trial with respect to the economic issue that we had

discussed in our discovery meeting of January 29, 1997. The statement which you requested is provided below.

In order that you may limit the extent of discovery you will seek from us, and *conditioned upon your agreement to do so,* plaintiffs hereby agree that they will be hereafter barred from asserting in this case the proposition that no adult arcade can survive economically, unless it operates in conjunction with an adult bookstore on the same premises. The only slight qualification to this statement is that it should be understood that plaintiff will continue to maintain and argue that the City's ordinance absolutely prohibits a system whereby one may preview sexually oriented videotapes prior to purchasing or renting such tapes at the same store. However, this is obviously a different point that the simple assertion that no adult arcade could survive economically unless it operates in conjunction with an adult bookstore on the same premises.

I hope the statement above succeeds in alleviating some of your time pressures. I look forward to our future discussion of the specific terms of the stipulation.

Very truly yours,

WESTON, GARROU & DeWITT

By /s/ G. R. Garrou
G. RANDALL GARROU

GRG:dl
LRG3080

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., et al.,	Case No. CV 95-7771 DDP (CTx)
Plaintiffs,	**Order**
v.	**Denying Defendant's Motion For Stay or Dismissal on Abstention Grounds**
CITY OF LOS ANGELES,	**Denying Plaintiffs' Motions for Summary Judgment on First Amendment, Equal Protection, and Vagueness and Overbreadth Causes of Action**
Defendant.	**Denying in Part and Granting in Part Defendant's Motion for Summary Adjudication**
	Denying Plaintiffs' Motion to Strike Use By Defendant of Evidence Involving 1983 Ordinance to Prove Intent of City Council When Passing 1978 Ordinance
	(Filed Jan. 11, 1998)

This matter comes before the Court on the parties' cross motions for summary judgment or summary adjudication of issues and on the defendant's motion for stay or dismissal of the action on abstention grounds. The Court heard oral argument on the summary judgment motions

on October 20, 1997. The Court finds the abstention issues appropriate for decision without oral argument.

After considering the arguments and evidence presented by the parties, the Court denies the plaintiffs' motion for summary judgment. The Court grants the defendant's motion for summary adjudication of the issue of selective enforcement in violation of the Fourteenth Amendment, and of the vagueness and overbreadth issues. The defendant's motion is denied in all other respects.

I. Introduction

The central issue in this case is whether the City of Los Angeles (the "City") violates the First Amendment by enforcing a zoning ordinance that defines certain activities as "adult entertainment businesses" and prohibits the operation of more than one such business in the same building. Non-obscene adult entertainment is protected by the First Amendment free speech clause. Local governments, however, may impose special zoning restrictions on adult entertainment businesses without violating the First Amendment, provided that such restrictions are directed at harmful "secondary effects" of such businesses, and not at suppressing the content of adult entertainment. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986). The plaintiffs contend that the City cannot demonstrate harmful secondary effects arising from multiple adult entertainment uses within a single business, and that therefore a multiple use restriction applicable only to adult entertainment businesses violates the First Amendment. The City contends that its studies

demonstrate that concentrations of adult entertainment businesses have harmful secondary effects, and that these studies support the multiple use restriction. The Court finds that while the studies addressed concentrations of separate adult entertainment businesses in an urban area, the studies did not treat the activities conducted by the plaintiffs' – video rental and on-premises video viewing – as separate businesses. The court therefore finds that there is a genuine issue of fact whether the operation of a combination video rental and video viewing business leads to the harmful secondary effects associated with a concentration of separate businesses in a single urban area. The Court therefore denies both motions for summary adjudication of the First Amendment issues.

II. Background

The plaintiffs are corporations that each operate an adult bookstore in the City of Los Angeles. The bookstores are Alameda Books and Highland Books. The bookstores offer "non-obscene sexually-oriented" videotapes for sale and rental.[1] (Declaration of Steven D. Wiener, President of Highland Books, Inc., and Alameda Books, Inc. ("Wiener Decl.") ¶ 5.)

In addition, the bookstores include a number of booths in which customers, for a small fee, can preview videotapes offered for sale or rental in the store. (*Id.*

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[1] The parties do not dispute the characterization of the material offered by the bookstores as non-obscene. The Court finds, therefore, that non-protected obscene speech is not at issue in this case.

¶ 13.) The stores also include a number of video booths which provide customers with an average of sixty different channels of videos. For a per-minute fee, customers may browse among the channels until a timer terminates the operation of the machine. (*Id.* ¶ 12.)

The plaintiffs challenge the validity of a portion of the Los Angeles Municipal Code that prohibits the maintenance of more than one adult entertainment business in the same building.[2] The multiple use provision, LAMC § 12.70(c), is part of an adult entertainment zoning ordinance mandating a minimum distance between adult entertainment businesses.

The City enacted the statutory scheme in response to the United States Supreme Court's approval of Detroit's adult entertainment "dispersal" zoning scheme in *Young v. American Mini Theatres*, 427 U.S. 50, 96 S. Ct. 2440 (1976). In 1977, the Los Angeles Police Department and the City's Department of Planning conduced studies which concluded that concentrations of adult entertainment had deleterious effects on the neighborhoods where such business were located.

In 1978, the City enacted LAMC § 12.70, prohibiting adult entertainment businesses from being established, enlarged or subject to transfer of ownership within 500 feet of churches, schools, or parks, or within 1,000 feet of

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[2] The Court takes judicial notice of the adult entertainment zoning ordinance, Los Angeles Municipal Code ("LAMC") § 12.70. (Plaintiffs' Request for Judicial Notice ("RJN") Ex. G.) The Court also takes judicial notice of the acts of the Los Angeles City Council enacting and amending the adult entertainment zoning scheme. (Plaintiffs' RJN Exs. A-F.)

other adult entertainment businesses. (*See* Plaintiffs' RJN Ex. A.) In 1983, the City amended LAMC § 12.70 to prohibit the maintenance of more than one adult entertainment business in the same building or structure ("multiple use ordinance"). LAMC § 12.70(C). (*See* Plaintiffs' RJN Ex. C.)

Under the ordinance, the component of the plaintiffs' businesses that rents video tapes for home use is defined as an "Adult Bookstore." LAMC § 12.70(B)(2)(a). The component of the plaintiffs' businesses in which customers may view tapes on the premises is defined as an "Adult Arcade." LAMC § 12.70(B)(1). The 1983 multiple use ordinance defines an "Adult Entertainment Business" as an

> Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theatre, Adult Theatre, Massage Parlor, or Sexual Encounter Establishment, as defined herein, and each shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment.

LAMC § 12.70(B)(17).

The City has not enforced the multiple use ordinance since its enactment in 1983. The City was enjoined from enforcing the ordinance against several bookstores in *Topanga Press, Inc., et al v. City of Los Angeles*, CV 88-7838 RG (SHx) (C.D. Cal. 1991), *aff'd*, 989 F.2d 1524 (9th Cir. 1993). (*See* Klekner Dec. Ex. 22 attached to Def.'s Am. Opp.) After the United States Supreme Court denied certiorari, the City settled the eight cases underlying *Topanga Press*,

stipulating to a permanent injunction prohibiting enforcement of the ordinance only against the *Topange Press* plaintiffs. (1 Defendant's RJN Ex. 1.)

In 1994, the City again threatened to enforce the ordinance. The targeted adult businesses filed two lawsuits. Preliminary injunctions issued in both cases, *Diamond v. City of Los Angeles*, CV 95-1534 AWT (C.D. Cal. June 9, 1995) and *E.W.A.P., Inc. v. City of Los Angeles*, CV 95-1711 AWT (C.D. Cal. June 9, 1995). The City settled, again stipulating to a permanent injunction as to the businesses involved in the lawsuits. (King Decl. ¶¶ 9-10.)

In November 1995, the plaintiffs' counsel heard from the counsel in *Diamond* and *E.W.A.P.* that the City was planning to prosecute Alameda Books under the ordinance. (Complaint ¶ 40.) The plaintiffs initiated this action seeking declaratory and injunctive relief under 42 U.S.C. § 1983. On December 19, 1995, this Court issued a preliminary injunction barring enforcement of the ordinance until its constitutionality could be determined.

The plaintiffs assert three causes of action. The first cause of action alleges that the ordinance facially violates the First Amendment free speech clause and the Fourteenth Amendment equal protection clause. The second cause of action alleges that the adult entertainment zoning scheme violates the First Amendment by failing to provide for reasonable alternative avenues of communication. (The second cause of action is not at issue in these summary judgment motions.) The third cause of action alleges that the ordinance is vague and overbroad.

Both parties have filed motions for summary judgment on the first and third causes of action. The City has

filed a motion to stay or dismiss the action on abstention grounds.

III. Abstention

The City contends that the Court should dismiss or stay this action under all three theories of federal abstention: *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941); and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

A. *Younger* Abstention

Federal courts may not enjoin or otherwise interfere with pending state criminal prosecutions absent extraordinary circumstances. In order to maintain the proper constitutional relationship between federal and state authorities, the federal courts must allow the state courts to adjudicate all claims in a pending criminal proceeding, including federal claims. *Younger*, 401 U.S. 37, 54 (1971). Of the three doctrines of abstention, only *Younger* is jurisdictional. Where it applies, the district court must dismiss the action. Schwartzer, et al., *California Practice Guide, Federal Civil Procedure Before Trial* § 2:1292.1 (Rutter 1996).

The requirements for *Younger* abstention are (1) a pending state court proceeding, (2) implication of important state interests, and (3) adequate opportunity to raise the federal claims. *Id.* § 2:1291.2.

1. Pending State Court Proceedings

For *Younger* abstention to apply, state judicial proceedings must be pending. The imminence of proceedings in the near future is not sufficient to justify *Younger* abstention. In *Agriesti v. MGM Grand Hotels, Inc.*, 53 F.3d 1000 (9th Cir. 1995), the plaintiffs were arrested and cited for misdemeanor trespass while distributing leaflets in front of a Las Vegas hotel. The Las Vegas district attorney never filed the citations with the state court. *Id.* at 1001. The district court abstained, holding that the arrests and issuance of a misdemeanor citation triggered the *Younger* rule. The Ninth Circuit reversed, holding that the district court erred by abstaining in the absence of a state judicial proceeding. *Id.* The court held that arrest and citation are executive, not judicial acts. *Younger* abstention was, therefore, neither required nor proper. *Id.* at 1002.

Here, the City makes the same argument rejected in *Agriesti*. On August 16, 1995 a criminal misdemeanor citation was issued against Alameda Books, charging that Alameda Books operated two adult businesses in the same location in violation of LAMC § 12.70(C). The citation did not set an appearance date, but instead provided that Alameda Books would be notified of the date by the Los Angeles City Attorney's office. (Motion at 8 n.6.) The city attorney's office never initiated a criminal proceeding based on the citation, despite having three months to do so before this Court issued its TRO in November 1995. (Opp. at 10.)

Because no state judicial proceeding was pending at the time this action was filed, the Court may not apply *Younger* abstention.

B. *Pullman* Abstention (Deferral)

The City requests that the court apply *Pullman* abstention as to plaintiff Highland Books. Federal courts may abstain where a limiting construction by the state courts might make federal constitutional review unnecessary. *Pullman*, 312 U.S. at 500. *Pullman* abstention is not jurisdictional. Where it applies, the court must retain jurisdiction while the unsettled issue is litigated in state court. *Almodovar v. Reiner*, 832 F.2d 1138, 1141 (9th Cir. 1987) ("Failure to retain jurisdiction is reversible error.").

The Ninth Circuit requires the presence of the following factors for *Pullman* abstention: (1) the complaint must touch a sensitive area of social policy on which the federal courts ought not to enter unless no alternative to its adjudication is open; (2) the case must present a state law issue whose resolution would terminate the constitutional controversy; and (3) the resolution of the state law issue must be doubtful or uncertain. *Pearl Inv. Co. v. City & Cty. of San Francisco*, 774 F.2d 1460, 1463 (9th Cir. 1985).

1. Sensitive Area of Social Policy

In First Amendment cases this factor "will almost never be present because the guarantee of free expression is always an area of particular federal concern." *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989). Abstention would aggravate the "impermissible chilling of the very constitutional right" the plaintiff seeks to protect. *Id.*

On the other hand, zoning and land use planning are matters of "sensitive social policy" over which federal

courts should not normally intervene. *Kollsman v. City of Los Angeles*, 737 F.2d 830, 833-37 (9th Cir. 1984) (holding that district court erred in not abstaining where constitutional issue depended on interpretation of complex statutory land-use scheme which state courts had not yet interpreted).

The Ninth Circuit addressed the conflict between First Amendment concerns and sensitive social policy in *Almodovar*, where the plaintiffs challenged the use of state pandering and prostitution statutes to prohibit the production of sexually explicit films. The Ninth Circuit affirmed the district court's decision to abstain for two reasons. First, the court noted that statutes regulating prostitution touch an area of social policy that is arguably more sensitive than land-use planning. *Id.* at 1140. Second, the court held that abstention would not aggravate any chilling effect because that state issue in question could be adjudicated in a single proceeding with little delay, after which the plaintiffs could pursue any remaining constitutional claim. *Id.* at 1140-41. In addition, other parties were presenting the same issues to the California Supreme Court in a case pending at the time the district court decided to abstain. *Id.* Therefore, the state issue was likely to be resolved without substantial delay.

The city argues that here, as in *Almodovar*, there is no danger of a chilling effect. Plaintiff Highland Books has been in business since 1987. LAMC § 12.70(C) has been in effect during that entire time. The City argues that Highland Book's failure to challenge the ordinance before now indicates that its expression has not been chilled. (Reply at 2.) This argument ignores the effect of the City's renewed enforcement on the ordinance as signaled by the

misdemeanor citation issued to Alameda Books on August 16, 1995. In addition, here, unlike in *Almodovar*, there is no pending state court proceeding that might produce a limiting construction of the ordinance before a significant chilling effect has occurred. Therefore, it is appropriate for the Court to treat this case according to the *Ripplinger* rule where First Amendment freedom of speech is at issue.

2. Existence and Uncertainty of State Law Issue

The question under this factor is whether the law at issue is fairly susceptible to a constitutional construction by a state court applying state law. The City argues that because Highland Books has never been cited or inspected under the statute, "in the absence of some administrative determination, it is not possible to know how LAMC § 12.70(C) would be applied to this business." (Motion at 4.) The lack of enforcement, however, is not relevant to *Pullman* abstention. The relevant question is not whether law enforcement authorities will interpret the statue so as not to chill Highland's freedom of expression, but whether the state courts will interpret the statute.

The plaintiffs argue that the case law in California has already narrowed the definition of "adult entertainment uses" in such a way as to foreclose the possibility of state court decisions that would moot the federal constitutional issue. In *People v. Superior Court (Lucero)*, 49 Cal. 3d 14, 259 Cal. Rptr. 740 (1989), the California Supreme Court set forth a standard for interpreting anti-clustering ordinances that restrict adult entertainment business

within a certain distance of each other. Prior to *Lucero*, the California courts had limited construction of these statutes so that they only applied to businesses whose activities were at least 50% adult entertainment. *Pringle v. City of Covina*, 115 Cal. App. 3d 151, 171 Cal. Rptr. 251 (1981). The *Lucero* court rejected this preponderance standard because it defeated the anti-clustering ordinance's purposes. Instead, the court endorsed a standard under which a business that engaged in a "regular and substantial course of conduct" of adult entertainment would be covered by adult entertainment ordinances. *Lucero*, 49 Cal. 3d at 27-28. The *Lucero* court expressly overruled *Kuhns v. Board of Supervisors*, 128 Cal. App. 3d 368, 181 Cal. Rptr. 1 (1982), which had applied the *Pringle* preponderance standard to adult bookstore uses such as those at issue in this case. *Lucero*, 49 Cal. 3d at 28 n.10. The plaintiffs argue that because the California Supreme Court has set the *Lucero* standard as the most restrictive possible definition of an adult entertainment use, no further narrowing on state law grounds could remove Highland's combined bookstore/video arcade from the ordinance's coverage. (Opp. at 6.)

The City asserts that *Lucero* did not foreclose every possible narrowing construction.[3] The City argues that

[3] The *Lucero* opinion noted that a municipality remains "free to further define the standard – for example, by making reference to a percentage of films shown, or the percentage of revenue received by the adult entertainment business. It may also amend its ordinance to impose less restrictive standards." *Lucero*, 49 Cal. 3d at 28 n.9. This dictum provides no guidance here. The City has not chosen to narrow its ordinance in this fashion.

the California courts could construe LAMC § 12.70(c) not to prohibit multiple uses by the same owner, or where two businesses have traditionally been operated together. (Reply at 3.) The plain language of the ordinance, however, forecloses such a construction. The ordinance provides that each adult entertainment business "shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." LAMC § 12.70(B)(17). This language does not lend itself to the type of limiting construction suggested by the City. *Pullman* abstention is therefore not appropriate in this case.

C. *Burford* Abstention (Comity)

Burford abstention prevents interference with a state regulatory scheme. The Ninth circuit requires the following factors to be present: "(1) that the state has concentrated suits involving the local issue in a particular court; (2) that the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy." *Tucker v. First Maryland Sav. & Loan, Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991). Where these factors are present, dismissal rather than stay is appropriate. *Id.*

Burford abstention is inappropriate where federal issues are controlling. "A case involving a first amendment challenge to a state statute is unlikely to implicate purely local issues that the state courts may be especially competent to deal with." *Ripplinger*, 868 F.2d at 1049 n.6.

Here, although the City calls LAMC § 12.70(C) a zoning ordinance, the City has not claimed that the instant dispute is the subject of a zoning variance or other administrative procedure that might give rise to *Burford* abstention. The only process initiated against the Plaintiffs is the misdemeanor citation issued to Alameda Books. As discussed above, the City did not pursue a criminal or administrative proceeding as a result of this citation.

Because there is no current administrative proceeding, and because the federal issues in this case are likely to be controlling and are easily separable from any complicated state law or regulatory issues, the Court concludes that *Burford* abstention is inappropriate.

IV. Summary Judgment

A. Standard for Summary Judgment

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In order to defeat a motion for summary judgment, there must be facts in dispute that are both genuine and material, i.e., there must be facts upon which a fact finder could reasonably find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The court does not weigh the evidence or make credibility determinations; rather, the court only determines whether there are any disputed issues and, if so, whether those issues are both genuine and material. *Id.*

The initial burden of establishing that there is no genuine issue of material fact lies with the moving party. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 323; *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978). Once the movant has met this burden by producing evidence that, if left uncontroverted, would entitle the moving party to a directed verdict at trial, the burden shifts to the non-movant to present specific facts showing that there is a genuine issue of material fact. *See* Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Lake Nacimiento Ranch Co. v. San Luis Obispo*, 841 F.2d 872, 876 (9th Cir. 1987).

B. Statute of Limitations

The City contends that plaintiffs' claims are barred by the one-year statute of limitations borrowed from California law for this § 1983 action. *See Cervantes v. San Diego*, 5 F.3d 1273, 1275 (9th Cir. 1993). The court previously rejected the statute of limitations defense when the City offered it in opposition to the preliminary injunction. (Order Granting Preliminary Injunction, Dec. 20, 1995.) The multiple use amendment to LAMC § 12.70 was enacted in 1983. The plaintiffs did not file this action until twelve years later. The plaintiffs argue that their action could not have accrued in 1983 because their businesses did not exist until early 1991 and 1992. If their cause of action accrued at the time of the formation of the businesses, then three to five years passed before they filed their complaint.

In a facial challenge under the First Amendment, however, the injury is viewed as continuing "based upon

the statute's on-going effect on protected speech." *Santa Fe Springs Realty v. City of Westminster*, 906 F. Supp. 1341, 1364-65 (C.D. Cal. 1995) (rejecting statute of limitations defense to facial challenge of adult entertainment licensing ordinance). In addition, the plaintiffs contend that because the City had stipulated to non-enforcement of the ordinance in previous lawsuits, the plaintiffs had no reason to believe that it would be enforced against them until plaintiff Alameda Books was cited in August 1995 for violating the ordinance.

Because of the continuing nature of First Amendment injuries, the Court rejects the City's statute of limitations defense.

C. First Amendment

The city asserts that the multiple use ordinance is a valid time, place and manner restriction based not on the content of the plaintiffs' speech, but on the deleterious secondary effects associated with adult entertainment businesses. Ordinarily, the government may not apply time, place and manner restrictions based on the content of speech. *Renton*, 475 U.S. at 46-47, 106 S. Ct. at 928. Although the ordinance here targets adult entertainment businesses based on specific definitions of adult content, such restrictions are not content-based if the predominate purpose of the ordinance's enactment is to ameliorate deleterious secondary effects of such businesses. *Id.* at 48.

A content-neutral time, place and manner restriction on speech is constitutional if it furthers a substantial government interest and is narrowly tailored to affect no

more speech than is essential to the furtherance of that interest. *Young*, 427 U.S. at 79-80, 96 S. Ct. at 2457 (Powell, J., concurring) (citing *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968)).

In the adult entertainment context, the Ninth Circuit has used a three-step analysis to determine whether an ordinance is a valid time, place and manner restriction. *See Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1332 (9th Cir. 1987). The first step is to determine whether the ordinance bans the plaintiffs' expressive conduct altogether. If it does, it is not a "time, place and manner restriction." *Id.* The second step is to determine whether the ordinance should be analyzed as content-based or content-neutral. Where, as here, the ordinance on its face differentiates on the basis of content, the issue is whether the predominate motivation in passing the ordinance was to ameliorate adverse secondary effects of speech rather than to suppress speech itself. *Id.* If the restriction is content-neutral, the third step is to determine whether the restriction serves a substantial government interest, is narrowly tailored to serve that interest and allows for reasonable alternative avenues of communication. *Id.; see also Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 122 n.*, 112 S. Ct. 501, 511 n.* (noting that under *Renton* "regulations must be 'narrowly tailored' to advance the interest asserted by the State"). Although the regulation must be narrowly tailored to serve a substantial government interest, it need not be the least restrictive means of serving that interest. *Ward v. Rock Against Racism*, 491 U.S. 781 109 S. Ct. 2746 (1989); *Renton*, 475 U.S. at 52, 106 S. Ct. at 931 (noting that

state and local governments have broad latitude to choose means of ameliorating secondary effects).

1. Time, Place and Manner Restriction

The plaintiffs argue that the ordinance is not a time, place and manner restriction because it would eliminate entirely a particular type of expression – the operation of a combination bookstore/arcade – rather than limiting such expression to a particular time, place or manner. (Plaintiffs' First Amendment Motion ("FA Motion") at 11-12.) The plaintiffs contend that a combination bookstore/arcade represents a unique form of expression because it allows customers to preview video tapes before purchasing or renting them. (Wiener Decl. ¶¶ 13, 16, 19: Plaintiffs' FA Statement of Uncontroverted Facts ("UF") ¶¶ 31-33.) For purposes of clarity, the Court will refer to this purported form of communication as "on-premises previewing."

The issue is whether on-premises previewing is a form of communication protected by the First Amendment. If on-premises previewing is a form of communication, then the City may not enforce an ordinance that prevents this form of expression anywhere in the City. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76, 101 S. Ct. 2176, 2186 (1981) (holding that zoning ordinance construed by state courts to ban all live entertainment in municipality is not valid time, place and manner restriction). The difficulty with plaintiffs' argument on this point, however, is that the plaintiffs fail to demonstrate how customers receive any message via on-premise previewing that they cannot receive by patronizing separate

bookstores and video arcades. The plaintiffs cite no authority for the proposition that the "ability of adult business customers to view or preview constitutionally protected sexually-oriented videotapes immediately prior to renting or purchasing the videotape is clearly protected by the First Amendment." (Plaintiffs' FA Reply at 11.)

The plaintiffs contend that persons interested in sexually-oriented videotapes have only limited access to information needed to inform their purchasing decision because such videotapes are not reviewed in the mainstream media. (Plaintiffs' FA Motion at 20.) Mainstream films are widely reviewed on television, radio and in newspapers as well as by word of mouth. (*Id.*) The plaintiffs contend that the only outlet for similar information about sexually-oriented videotapes is the combination bookstore/arcade that allows customers to gain information about the tapes by previewing them. (*Id.*) The City responds that the plaintiffs have ample opportunities to communicate with their customers about the content of the videos in the stores via posters, the videotape cartons, video monitors in the stores, or free preview booths, which the City contends would not constitute separate "adult arcades" under the ordinance. (Def. Opp. at 11.)

The Supreme Court has held that the right of free speech also protects a corresponding "right to receive" speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757, 96 S. Ct. 1817, 1823 (1976). The right to receive information, however, does not imply a right to receive information in any particular way. *See Hoffman Estates v. Flipside*, 455 U.S. 489, 102 S. Ct. 1186 (1989) (upholding restriction on the

sale of items displayed in proximity to drug-related literature because merchant has only an "attenuated interest" in displaying literature in any way the merchant desires).

No court, however, has considered whether on-premises previewing is protected by the First Amendment. An analogous issue is presented in cases dealing with ordinances that require stores to display adult magazines behind "blinder racks" to obscure magazine covers which the state deems "harmful to minors." *See, e.g., Berry v. City of Santa Barbara*, 40 Cal. App. 4th 1075, 47 Cal. Rptr. 2d 661 (1995). Although such restrictions burden adults' First Amendment right to receive non-obscene material, they have been upheld as justified by the state's compelling interest in protecting children. *See id.* 40 Cal. App. 4th at 1086, 47 Cal. Rptr. 2d at 668; *American Booksellers v. Webb*, 919 F.2d 1493, 1509 (11th Cir. 1990). The customers' right to preview the magazines before purchase is satisfied because customers can read the unblinded portion of the cover to "determine the basic content of the publication, and thus, whether they wish to purchase it." *Berry*, 40 Cal. App. 4th at 1086, 47 Cal. Rptr. 2d at 668.

Here, as in the blinder rack cases, customers of a stand-alone adult bookstore can freely peruse among the shelves and determine from the advertising on the videotape cartons whether they wish to purchase or rent a tape. The First Amendment does not require that customers be able to preview the videotapes through a commercial arcade enterprise on the premises.

Nor does the First Amendment require a more extensive right to preview adult videotapes because information about them is scarce in the mainstream media. The

unpopularity of a particular type of speech does not give it greater First Amendment protection. In *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S. Ct. 2559 (1981), the Supreme Court upheld a state fair rule that limited charitable solicitation to fixed booths. The religious organization challenging the rule had argued that the rule favored organizations whose booths would attract more listeners than those of less popular organizations. The Court found that any disparate impact on unpopular speech did not invalidate the rule as a reasonable time, place and manner restriction. *Id.* at 649 n.12.

Here, the plaintiffs have not raised a genuine issue as to suppression of a purported right to on-premises previewing. There is a separate question, however, as to whether the ordinance would completely suppress adult arcades by mandating their separation from adult bookstores. The *Young* plurality noted that secondary effects doctrine should not apply "if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." 427 U.S. 73 n.35. "The test for determining whether the Adult Business' First Amendment rights are threatened is whether a local government has 'effectively den[ied] . . . [the Adult Businesses] a reasonable opportunity to open and operate' their enterprise within the city in question." *Topanga Press*, 989 F.2d at 1529 (quoting *Renton*, 475 U.S. at 54). In determining whether a regulation suppresses speech, however, the Court may not consider the economic injury caused by the regulation. *Topanga Press*, 989 F.2d at 1524. That the operation of a

free-standing video arcade might be economically unviable is irrelevant.[4] *See Id.*

The only evidence offered by the plaintiffs for the proposition that the ordinance eliminates free-standing arcades is the declaration of Steven Wiener, the president of Alameda Books and Highland Books. Wiener declares that during his 15 years in the adult entertainment industry he has never seen or heard of a free-standing adult video arcade. (Wiener Decl. ¶ 17; *see also* Garrou Decl. ¶ 11.) The City contends that free-standing video arcades or their equivalents have existed since the late nineteenth century in the form of "peep shows," "penny arcades" and "nickelodeons." (Def. Motion at 13-14; Def. Opp. Exs. 6-9.) The Court finds that the existence of penny arcades in the 1890s is not relevant to the question of whether adult video arcades can exist separately from adult bookstores in the 1990s.

In addition the City asserts that the plaintiffs operated their adult video arcades as separate businesses for at least three years. (Def.'s Statement of Genuine Issues ¶ 35; Second Decl. of Steven Wiener in Support of Plaintiffs' Application for Preliminary Injunction ¶ 2 (asserting that from 1987 to 1990, only the arcade at Alameda Books met the ordinance's definition of an adult entertainment

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[4] In addition, the plaintiffs have entered into a stipulation barring them from "asserting in this case the proposition that no adult arcade can survive economically, unless it operates in conjunction with an adult bookstore on the same premises." (King Decl. Ex. 21.) The plaintiffs entered into this stipulation in return for the defendant's agreement not to seek discovery of financial information relating to their businesses. (*Id.*; King Decl. ¶ 14.)

business); *id.* ¶ 4 (asserting same for Highland Books from 1987 to 1991). This assertion is misleading. From 1987 to approximately 1991, Alameda Books and Highland Books reduced the percentage of adult material in the bookstores to below fifty percent. At that time, the California courts had construed adult entertainment zoning ordinances to cover only businesses whose stock in trade included a preponderance of adult content.[5] Thus, the arcades were never truly free-standing, but were always attached to some type of bookstore.

The Court finds that the plaintiffs have not raised a genuine issue as to whether the ordinance would eliminate video arcades by separating them from bookstores. Wiener's assertion that he has never seen an independent arcade is insufficient to demonstrate that independent arcades cannot exist. The Court notes, however, that the contention that the zoning scheme does not leave space in

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[5] From 1987 to 1991, Alameda Books and Highland Books operated as "Pringleized" bookstore/arcades. The term refers to *Pringle v. City of Covina*, 115 Cal. App. 3d 151, 171 Cal. Rptr. 251 (1981), *overruled by Lucero*, 49 Cal. 3d 14, 259 Cal. Rptr. 740. *Pringle* construed in adult entertainment ordinance to apply only to businesses in which 50% or more of the stock in trade consisted of adult material. In response to this construction of the ordinance, Alameda Books and Highland books reduced their adult bookstore inventory to less than 50% adult material in order to be allowed to maintain their video arcades. (Plaintiffs' Response to City's Statement of Genuine Issues 10.) Such a strategy would no longer work to remove a business from the scope of the ordinance because the *Pringle* preponderance standard has been replaced with a "regular and substantial use" standard, under which both the bookstore and arcade uses would meet the adult content definition. *Lucero*, 259 Cal. Rptr. at 741.

Los Angeles for the relocation of separated arcades and bookstores will be addressed in adjudication of the second cause of action, which is not part of this motion.

2. Content Neutral

Ordinances enacted for the purpose of regulating speech based on content presumptively violate the First Amendment. *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1334 (9th Cir. 1986). Although the ordinance here targets adult-entertainment businesses based on a specific definition of adult content, the ordinance may be treated as content-neutral if the predominate purpose of its enactment was to ameliorate harmful secondary effects of adult entertainment businesses. *Renton*, 475 U.S. at 48, 106 S. Ct. at 929. In order to be treated as content-neutral, the regulation must be "justified without reference to the content of regulated speech." *Id.* (internal quotation marks omitted). This requirement is met if the involved ordinance is "aimed to control secondary effects resulting from the protected expression" rather than to inhibit the protected expression itself. *Tollis*, 827 F.2d at 1332.

In support of its contention that the predominate purpose of the multiple use ordinance was to ameliorate secondary effects, the City points to the language of the 1977 ordinance at its 1983 amendment, the 1977 secondary effects studies relied upon the by the [sic] City Council, and the planning department staff report prepared for the City Council in connection with the 1983 multiple use amendment.

The Court finds that there is no genuine issue of fact as to whether the 1978 and 1983 City Councils expressed a predominate purpose to ameliorate the secondary effects of adult entertainment businesses. The 1978 ordinance contained a preamble finding that the concentration of adult businesses "tends to result in the blighting and degradation of the areas of such concentration." (Plaintiffs' RJN, Ex. A at 4 (Ordinance 151,294, enacted on Jul. 28, 1978).) The multiple use restriction was first enacted as an urgency ordinance in 1982, which included the legislative finding that "the concentration of adult entertainment businesses at a single location may tend to have an adverse impact on the neighborhood in which they are located and is contrary to the dispersal approach taken by the City in enacting the adult entertainment ordinance." (Plaintiffs' RJN Ex. C at 17 (Ordinance 156,509, enacted Mar. 10, 1982).) Both ordinances refer to the 1977 police and planning department studies which had concluded that concentrations of adult entertainment uses have adverse secondary effects. In 1982, the Planning and Environment Committee of the City Council requested a report from the planning commission on the need to amend the adult entertainment ordinance to prohibit more than one adult entertainment business at a single location. (3 Def's RJN Ex. 5.) The planning commission staff reported that the 1978 ordinance had been interpreted by the Department of Building and Safety to allow the combination of several adult businesses "within the exterior structural walls of a single building at one site." The staff report recommended passage of the multiple use ordinance as a means of preventing concentrations within a single building. (*Id.*)

In light of this legislative history, the Court finds that the 1978 ordinance and the 1983 multiple use amendment were aimed to control secondary effects rather than to suppress speech.

The plaintiffs contend that the Court must look behind the City Council's expressed intent in order to determine whether the evidence before the City Council actually supported the conclusion that multiple uses within a single building caused adverse secondary effects. Some courts have held that a city must prove adverse effects in order to meet the content neutral prong. *See, e.g., Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 932 F. Supp. 1256 (D. Colo. 1996); *Sebago, Inc. v. City of Alameda*, 211 Cal. App. 3d 1372, 259 Cal. Rptr. 918 (1989). The approach taken by the Ninth Circuit, however, has been to determine content-neutrality based on the local government's stated predominate purpose. Then, as part of the substantial government interest prong, the city's stated purpose is evaluated to determine whether adverse effects actually exist and are caused by the speech that the ordinance restricts. *See Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219, 221 (9th Cir. 1989); *Tollis*, 827 F.2d at 1332-33, *Walnut Properties*, 808 F.2d at 1334. This is also the approach applied in *Renton* itself. 475 U.S. at 48-53, 106 S. Ct. 929-30 (examining the stated purpose of ordinance to determine content-neutrality, then examining evidence of secondary effects to determine substantial government interest); *see also, ILO Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1416 (8th Cir. 1994) (holding that failure to prove adverse secondary effects implicates the substantial government interest prong, not the content-neutral prong). The plaintiffs'

arguments regarding the applicability and validity of the 1977 studies are appropriately considered as part of the third prong of *Renton* analysis, in order to determine whether the ordinance is narrowly tailored to serve a substantial government interest.

3. Whether The Multiple Use Ordinance is Narrowly Tailored to Serve a Substantial Government Interest

There can be no question that a city's interest in combating urban blight is substantial. *Renton*, 475 U.S. at 50, 106 S. Ct. at 930; *Tollis*, 827 F.2d at 1332. The issue is whether the multiple use ordinance furthers that interest. In order to demonstrate that the ordinance serves its interest in combating urban blight, the City has the burden to "prove that existence of the 'secondary effects' it is seeking to prevent." *Acorn*, 887 F.2d at 222.

In *Acorn*, the City of Seattle imposed a licensing fee on video arcades in 1955. The City justified the fee as a means of paying the law enforcement costs of dealing with crimes committed in the video arcades. In 1986, Seattle began enforcing design restrictions that made the video arcades less private, and therefore less useful for prostitution and drug dealing. The plaintiff in *Acorn* contended that the resulting reduction in crime removed the adverse secondary effect on which Seattle based its claim of a substantial government interest for the licensing fee. The Ninth Circuit agreed with the plaintiff, holding that the district court's factual finding that the arcades "currently" fostered criminal activity was clearly erroneous. *Id.* at 224. While the court accepted the city's argument

that it had a substantial interest in controlling crime, it held that the licensing fee was unconstitutional because the adverse secondary effect on which the city relied no longer existed. *Id.*; *see also Tollis*, 827 F.2d at 1333 (holding that city had failed to demonstrate that single showing of an adult movie would have any harmful secondary effects on the community).

In addition, the methods selected to combat the adverse secondary effects must be narrowly tailored to affect only that category of adult entertainment shown to produce the unwanted secondary effects. *Tollis*, 827 F.2d at 1333; *Renton*, 475 U.S. at 52, 106 S. Ct. at 931; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31, 113 S. Ct. 1505, 1517 (1993) (rejecting application of secondary effects doctrine to ban use of newsracks to dispense commercial handbills because city made no showing that secondary effects were unique to commercial newsracks and not also caused by newspaper racks, which were not regulated). If the operation of a bookstore and arcade as a multiple use does not produce the secondary effects observed in the 1977 studies, then the ordinance fails the narrow tailoring test.

The issue is whether the operation of an adult arcade and bookstore on the same premises creates the type of adverse secondary effects identified in 1977 studies.

The police department study, entitled "The Impact of Sex Oriented Businesses in the City of Los Angeles" compared crime and arrest statistics for the Hollywood area to citywide crime and arrest statistics during the period from 1969 to 1975. (4 Def.'s RJN Ex. 5 at 653.) The

study concluded that an increase in prostitution, robberies, assaults and thefts for the Hollywood area was positively correlated with an increase in adult entertainment businesses in the area. (*Id.* at 655.) The study considered four types of adult businesses: "hard-core motels," "bookstores," "theaters," and "massage parlor/scam joints." (4 Def.'s RJN Ex. 5 at 657.) Video arcades are not one of the categories in the police study. It is unclear from the police study whether video arcades are considered at all, or whether they are included as a type of "theater" or were included in combination with the "bookstores."

In addition to its objective component, the police department study included letters from police officers stating their personal observations that crime had increased in Hollywood with the growth of adult entertainment businesses. (*Id.* at 662-71.) The police department study also included a section entitled "Letters from Businessmen, Clubs, Churches, Etc., Regarding Hollywood." (*Id.* at 672-828.) The letters, numbering in the hundreds, generally express opposition to the content of adult entertainment, and urge the police department to do everything possible to shut down adult entertainment businesses.

The planning department study, entitled "Study of the Effect's of the Concentration of Adult Entertainment Establishments in the City of Los Angeles" concluded that the concentration of adult entertainment businesses had deleterious effects on the community. The objective portion of the planning department study selected five areas of "known concentrations of adult entertainment businesses." (*Id.* at 379.) The five "study areas" were each

compared to a nearby "control area" selected for its lack of adult entertainment businesses. The study measured changes assessed value of land and improvements for properties in the study areas and control areas from 1970 to 1976. (*Id.*)

The planning department study counted four types of adult entertainment businesses for purposes of defining an area of high concentration: "massage parlors," "bookstores/arcades," "theaters," and "adult motels." (*Id.* at 380-87.) The study does not state whether the businesses classified as "bookstores/arcades" were free-standing bookstores or arcades, or combination bookstore/arcades.

The study concluded that assessed property values increased in all of the study areas from 1970 to 1976. (*Id.* at 383.) Two areas of adult entertainment concentration registered much higher increases in property values than did their control areas. (*Id.* at 383-88.) Three of the study areas registered lower rates of increase than did their control areas. (*Id.*) The objective portion of the study concluded that

> there would seem to be some basis to conclude that the assessed value of property within the study areas containing concentrations of adult entertainment businesses have *generally* tended to increase to a lesser degree than similar areas without such concentrations. However, there would appear to be insufficient evidence to support the contention that concentrations of sex-oriented businesses have been the *primary cause* of these patterns of change in assessed valuations between 1970 and 1976.

(*Id.* at 388-89.)[6]

The planning department study also included a report from the police department on changes in the concentration of adult businesses in the entire City of Los Angeles from 1975 to 1976, updating and expanding the police department study described above, which considered only Hollywood during the period from 1969-75. (*Id.* at 414-16.) This updated police department report classified adult entertainment uses as "adult motels," "massage parlors," "bookstores/arcades," and "theaters." (*Id.* at 414.)

The City contends that the planning department study identified "bookstores and adult arcades as distinct adult entertainment businesses for purposes of its work." (Defendant's UF ¶ 39.) The City correctly points out that the introduction to the planning department study names arcades and bookstores separately among the adult entertainment establishments considered by the study. (*Id.*) The Court finds, however, that the body of the study, in categorizing adult businesses for purposes of determining the effects of their concentration, treats bookstore/arcade combinations as single businesses. In defining

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[6] The planning department study also included subjective portions, one of which was a mail survey of real estate agents and appraisers to determine their opinion of the impact of concentrations of adult entertainment businesses on property values. The majority of the respondents indicated their belief that adult entertainment businesses had a negative impact on property values. (*Id.* at 396-406.)

areas of concentration, the study treats bookstores/arcades as a single unit of entertainment whose secondary effects arise from proximity to several other units of adult entertainment. The study does not analyze bookstore/arcade combinations as concentrations of adult entertainment businesses.

The City contends that because many of the adult entertainment businesses in the studies were classified as "bookstores/arcades," the studies support a finding that the combination of a bookstore and arcade on the same premises creates the adverse secondary effects found in the studies. (Def.'s UF ¶ 43.) The City's argument, however, ignores the purposes and conclusions of the studies. The studies were not directed at determining the impacts of individual adult entertainment businesses. Instead, the studies were concerned with the impacts created by concentrations of numerous adult entertainment businesses in small areas. The stated purpose of the studies was to determine whether a "dispersal" zoning ordinance of the type approved in *Young* would be appropriate for Los Angeles. (3 Def.'s RJN Ex. 5 at 357.)

By categorizing certain businesses as "bookstores/arcades," and examining areas where such bookstores/arcades were found in close proximity to several other adult entertainment businesses, the studies determined not the impact of a bookstore/arcade on the surrounding area, but the impact of bookstores/arcades as part of a concentration in combination with other adult businesses. The existence in the studies of the bookstores/arcades category does not support the City's contention that it has a substantial interest in separating bookstores from arcades. To the contrary, the fact that bookstores/arcades

were studied as unitary businesses militates in favor of a finding that the studies do not demonstrate that such a combination business is a concentration leading to the adverse secondary effects demonstrated by the studies. *See Walnut Properties*, 808 F.2d at 1335 (holding that city failed to establish that restriction on proximity to a church of the city's only adult theater was justified by its substantial interest in preventing concentration of adult businesses, because one adult business could not be concentrated with itself).

The studies support the City's general contention that it has a substantial government interest in addressing the adverse secondary effects of concentrations of adult businesses. There remains a genuine issue of fact, however, as to whether a combination bookstore/arcade of the type operated by the plaintiffs is a single business or a combination of two separate adult entertainment businesses of the type addressed by the 1977 studies. (*Compare* Def.'s UF ¶¶ 3, 7, *with* Pls.' UF ¶¶ 1-9, 29-31.)

The plaintiffs assert that their bookstores/arcades are single businesses for purposes of concentration-generated effects. The plaintiffs point to the physical layout and methods of operation of their businesses. Both activities take place in the same storefront with no physical separation at Alameda Books and only slight physical separation at Highland Books. (Wiener Decl. ¶ 8.) Customers enter and leave through one door, whether they are coming to use the bookstore or the arcade component of the businesses. (*Id.*) During most hours, one employee operates both the bookstore and the arcade. (*Id.* ¶ 7.) The arcade booths are used to promote rentals and sales from the bookstore. (Wiener Decl. ¶¶ 13, 15.)

The City contends that the bookstore and arcade components are separate because the ordinance defines them as separate uses. *See* LAMC § 12.70 (B)(17). The City contends that the police power to zone uses of land includes the ability to define certain activities as separate uses, even if they take place in the same business establishment. The City points to zoning regulations that define bakeries, dry cleaners, candy stores, drugstores, florists, grocery stores, butcher shops and delicatessens, automobile repair garages, and automobile services stations as separate uses, even though they may be operated in a single location. *See* LAMC § 12.13. (Def's Second RJN Ex. 15.)

The flaw in the City's argument, however, is that its police power is subject to a higher standard of review when used selectively based on protected speech. The City asserts that "[t]he City's Zoning Code defines many businesses, *both adult and non-adult*, as being separate uses even though they may be operated at a single location." (Def.'s UF ¶ 79 (emphasis added).) The City's authority to define businesses as separate uses without reference to protected speech may not be questioned by this Court if there is any rational basis for the classification. The classification of certain adult entertainment activities as separate businesses, however, is subject to a different standard of review because the City applies these definitions only to businesses that engage in protected speech. *See Schad*, 452 U.S. at 68, 101 S. Ct. at 2182-83 (noting that standard applied to judicial review of zoning power depends on "the nature of the right assertedly threatened or violated;" where property rights are affected, rational basis review applies; where free

speech rights are infringed, zoning law must be narrowly drawn to further a substantial government interest"). Because the separate business definitions in LAMC § 12.70(C) apply only to adult entertainment uses, and therefore discriminate on the basis of protected speech, they are subject to a higher level of review than rational basis, even when, as here, they are treated as content neutral under *Renton*. Thus, unlike the bakery, grocery, and service station definitions, the adult entertainment business definitions must be narrowly tailored to serve a substantial government interest. The City may not require adult bookstores/arcades to separate their businesses without demonstrating that the conduct of these activities in the same building has the adverse secondary effects demonstrated by the 1977 studies. The City's reliance on the zoning regulations applicable to bakeries and groceries would only be justified if the City required that all bookstore/arcade combinations be defined as separate businesses regardless of adult content. Such an across-the-board regulation would be subject only to rational basis review. But where, as here, the City applies the restriction only to bookstores/arcades that engage in protected speech, the higher standard of review must be applied. *See Christy v. City of Ann Arbor*, 824 F.2d 489, 493 (6th Cir. 1987) (holding that adult entertainment regulations under *Renton* require "more than a rational basis" to justify discrimination based on protected speech).

In addition, the City points to the different treatment of bookstores and "coin-operated amusements," such as arcades, in zoning regulations other than the adult entertainment ordinance. (Def.'s UF ¶¶ 81-88; Eberhard Decl. ¶¶ 5-9.) The City points to the declaration of Franklin

Eberhard, the Deputy Director of the Department of City Planning, and one of the authors of the 1977 planning department study. Eberhard declares the City has "historically regulated amusement enterprises separately from retail uses" because the two types of business involve different types of impact on the surrounding community. (Eberhard Decl. ¶¶ 4-7.) A bookstore, as a retailing operation in which the customers buy goods for consumption off-site, has a different impact in the form of "noise, hours of operation, parking and loitering," than does a video arcade which provides on-site public entertainment. (*Id.*)

Eberhard's declaration would be dispositive if the question were whether the City had a rational basis for an across-the-board regulation separating all bookstores from all video arcades. The City's police power clearly encompasses regulations meant to reduce noise, parking and loitering. The multiple use ordinance at issue here, however, applies to a set of bookstores/arcades defined by their exercise of protected speech. As discussed above, in order to single out businesses based on speech without violating the First Amendment, the City must demonstrate that the adult bookstore/arcade combination produces adverse secondary effects that would not be produced by a non-adult bookstore/arcade combination. *See Schad*, 452 U.S. at 73-74, 101 S. Ct. at 2185 (holding that municipality failed to demonstrate that live entertainment restricted by ordinance would produce secondary effects that would not also be produced by other, non-restricted commercial activity).

In addition, Eberhard makes the more general assertion that he has "had the opportunity to study the effects

of the provision of more than one type of business at a single location" and that in his experience "a location that only has one business does not have as many impacts on the surrounding community compared to a location with more than one business." (Eberhard Decl. ¶ 10.) While Eberhard's declaration might be sufficient to defend an ordinance that prohibited all multiple uses, it is irrelevant to the question whether an ordinance that prohibits multiple uses based on content violates the First Amendment. The argument that more than one business in a location has harmful secondary effects does not justify prohibiting multiple uses only for adult entertainment business and not for other types of businesses. *See City of Cincinnati*, 507 U.S. at 430-31, 113 S. Ct. at 1517 (rejecting application of secondary effects doctrine to ban on use of newsracks to dispense commercial handbills because city made no showing that secondary effects were unique to commercial newsracks and not also caused by newspaper racks which were not regulated); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225, 110 S. Ct. 596, 604 (1990) (noting that where generally applied licensing scheme is more onerous with respect to sexually oriented businesses than with respect to the majority of other businesses, First Amendment rights are implicated).

The City relies on *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), for the proposition that a finding of harmful secondary effects from concentration of adult entertainment businesses can support a multiple use restriction. In *Hart Book Stores*, the Fourth Circuit upheld an ordinance similar to the one at issue here. The ordinance defined an "adult establishment" as any adult bookstore, adult motion picture theater, adult mini

motion picture theater, or massage business, and prohibited the operation of more than one establishment in one building. *Id.* at 823. The only evidence offered to show the secondary effect of multiple uses was a report from the county health department on the unsanitary conditions found on a visit to five adult arcades. *Id.* at 829 n.9. The Fourth Circuit held that the health department report supported regulation of the secondary impact of adult arcades by prohibiting their operation in conjunction with another adult entertainment business.

Hart Book Stores, decided seven years before *Renton,* is inconsistent with controlling Ninth Circuit authority decided after *Renton.* The Ninth Circuit has required local governments to justify secondary effects regulations by showing that the conduct regulated actually produces the secondary effects that the government invokes to justify the regulation. *Acorn,* 887 F. 2d at 224. If, as here, the City justifies the regulation based on secondary effects produced by concentration of businesses, it must demonstrate that the conduct restricted relates to concentration. *Id.* It may not point to other secondary effects, such as unsanitary conditions within the businesses, that have nothing to do with the concentration of such businesses within a given area. The Court respectfully concludes that the Fourth Circuit in *Hart Book Stores* erred by treating testimony regarding unsanitary conditions inside a video arcade as related to secondary effects of concentration of adult entertainment businesses.

The City is correct in asserting that this case is like *Hart Book Stores.* There, as here, the government failed to demonstrate that the combination of adult entertainment

business in a single building is the equivalent of a concentration of separate adult businesses in a neighborhood. While such a failure passed constitutional muster in *Hart Book Stores,* it is fatal under the secondary effects doctrine as applied by the Ninth Circuit. Under *Acorn,* in order for the City to benefit from the content-neutral *Renton* analysis, the City must prove the existence of the specific secondary effects asserted in justifying the regulation as content neutral. *Acorn,* 887 F.2d at 224.

The 1977 studies on which the City relies to prove a substantial government interest demonstrate the need for a distance requirement for separate adult entertainment businesses. The planning department study did not address the secondary impact of single adult entertainment businesses.[7] Therefore, in order to justify the imposition of the distance requirement on the plaintiffs' bookstores and arcades, the City must demonstrate that the bookstore and arcade components are separate businesses, like those whose concentration was examined by the 1977 studies.

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[7] The planning department study's inapplicability to the question of whether a single adult entertainment business has harmful secondary effects is demonstrated by the study's method for selecting "control areas." By definition such areas did not have *concentrations* of adult businesses. Two of the five control areas, however, contained single adult businesses. (*See* 3 Def.'s RJN Ex. 5 at 380 (Hollywood Blvd. and Highland Ave. control area, Vermont Ave. and Santa Monica Blvd. control area). The City, therefore, cannot rely on the study to show harmful secondary effects of single adult entertainment businesses in the absence of concentration with other businesses.

The Court concludes that there is a genuine issue of fact as to whether the plaintiffs' bookstore and arcade operations are separate businesses. The issue for trial is whether the two components of the plaintiffs' stores create independent sets of secondary effects, which when concentrated at one location, lead to the adverse secondary impacts identified by the 1977 studies.

4. Reasonable Alternative Avenues of Communication

"To be reasonable, time, place and manner restrictions not only must serve significant state interests but also must leave open adequate alternative channels of communication." *Schad*, 452 U.S. at 75-76. The burden is on the city to show that enforcement of its ordinance would leave adequate alternative channels. *See Phillips v. Borough of Keyport*, 107 F.3d 164, 177 (3d Cir. 1997). The City need not show that the alternative avenues are as economically advantageous to the plaintiffs as their current locations. *Topanga Press*, 989 F.2d at 1528-29. If the zoning ordinance leaves open alternative sites that are part of the relevant market – i.e., that are not under water or so remote from the municipal infrastructure as to be unusable for any commercial purpose – the government need not ensure access to such avenues at "bargain prices." *Id.* at 1589; *Renton*, 475 U.S. at 55. The Supreme Court has held the alternative sites need not be actually available, but only "potentially" available. *Id.* The Ninth Circuit has defined "potentially available" in this context to exclude property if "it is unreasonable to believe that

[the property] would ever become available to any commercial enterprise." *Topanga Press*, 989 F.2d at 1524.

The parties have not moved for summary adjudication of the alternative avenues issue. The Court notes that previous litigation on this ordinance indicates the presence of a genuine issue as to whether the ordinance provides sufficient alternative avenues. The court of appeals in *Topanga Press* found that the district court had not abused its discretion in finding that the adult entertainment zoning scheme did not leave sufficient potentially available relocation sites for the adult entertainment businesses now in violation of the multiple use ordinance. 989 F.2d at 1533. The court of appeals in *Topanga Press* held that the lack of relocation sites created a "serious question of law as to whether the City has left open alternative avenues "of expression." *Id.* at 1534.

D. Equal Protection

1. Selective Settlement

The plaintiffs claim they have been denied equal protection of the laws because the City has agreed not to enforce the ordinance against other adult bookstore operators in a series of stipulated permanent injunctions, but has sought to enforce it against the plaintiffs. The issue here is whether the equal protection clause requires the City to apply the terms of the settlements to the plaintiffs even though the plaintiffs were not parties to the settled cases. The plaintiffs argue that the City's conduct in settling the previous lawsuits and refusing to settle the instant case involves an arbitrary classification which

cannot withstand rational basis scrutiny under the standard of *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S. Ct. 3249 (1985). There, the Court applied the rational basis standard to invalidate the application of a zoning ordinance against a group home for the mentally retarded. The court held that the ordinance, as applied to the group home, treated the home differently than it treated similarly situated care facilities and multiple-unit buildings. *Id.* at 447, 105 S. Ct. at 3258. The Court rejected the municipality's argument that negative attitudes of property owners toward the mentally retarded provided a rational basis for the distinction. *Id.* at 448, 105 S. Ct. at 3259.

The plaintiffs' argument ignores the government's broad discretion to choose whom it prosecutes. *See Wayte v. United States,* 470 U.S. 598, 607, 105 S. Ct. 1524, 1530 (1985). The equal protection clause is not violated by a decision to forego prosecution of certain charges as result of a settlement agreement or plea bargain. *See Bordenkircher v. Hayes,* 434 U.S. 357, 98 S. Ct. 663 (1978). Absent an allegation of selectivity based on impermissible discrimination by race, gender or national origin, or on some other arbitrary basis, selective prosecution for the purpose of settling cases does not violate equal protection. *Id.* at 364, 98 S. Ct. at 668-69.

The plaintiffs' equal protection argument fails because their situation is not similar to that of the parties to the *Topanga Press, E.W.A.P.,* and *Diamond* cases. Those parties entered into settlement agreements with the City, while the present plaintiffs did not. That distinction satisfies the equal protection clause. Nor does the equal protection clause require the City to offer the present

plaintiffs the same settlement terms as offered to the previous plaintiffs, absent an impermissible reason for the distinction.[8]

In their reply memorandum, the plaintiffs rely on *United States v. Steele,* 461 F.2d 1148 (9th Cir. 1972). There, the Ninth Circuit held that the Census Bureau violated the equal protection clause by choosing to prosecute only vocal organizers of a census resistance movement for violations of a statute prohibiting refusal to answer census questions. *Id.* at 1152. The court of appeals held that the Census Bureau had singled out the plaintiffs for prosecution based on their exercise of their First Amendment right to speak out against the census. This case, however, is distinguishable. The plaintiffs here do not assert that they have been singled out from among other adult businesses based on the exercise of First Amendment rights. On the contrary, the exercise of the right to

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[8] The City also contends that the plaintiffs are not similarly situated with the previous litigants because some of the previous litigants had a colorable claim to "grandfather" status under the Ordinance. (Def. Opp. at 14.) The ordinance exempts multiple use establishments that were in business prior to September 1, 1978. LAMC § 12.70(E) (3). The City offers several declarations to establish that at the time of the settlements it had reason to believe that the previous litigants were entitled to grandfather status under the ordinance. (Declaration of James L. Bangham; Declaration of Peter Nelson King.) The plaintiffs have filed evidentiary objections to these declarations on hearsay and best evidence grounds. Because, however, the Court need not reach this argument in order to reject the Plaintiffs' equal protection claim, the Court need not consider these declarations, and therefore need not determine their admissibility for purposes of the present summary judgment motions.

free expression is what makes the plaintiffs similarly situated to the other adult entertainment businesses. The City has not used its prosecutorial discretion to distinguish between those businesses that engage in speech and those that do not. Rather, it distinguishes between those adult businesses that were parties to the previous suit, and the present plaintiffs, all of whom engage in the same form of protected expression. The "strong inference of discriminatory prosecution" that arose in *Steele* from the distinction based on expressive conduct does not apply in this case.

The Court therefore grants the City's motion for summary adjudication on the issue of whether the City's selective enforcement of the ordinance violates the Fourteenth Amendment.

2. Classification Based on Exercise of Fundamental Right

The plaintiffs contend that the multiple use ordinance treats them differently than other multiple use businesses – such as a Sears Roebuck with an attached automobile service department – based on the plaintiffs' exercise of First Amendment protected speech. The plaintiffs argue that the City's interest in ameliorating the harmful effects of the plaintiffs' purported separate adult entertainment uses are adequately served by the zoning regulations applicable to each use. Using the Sears example, if the Sears retail store and the Sears auto repair department were both allowed in a given zone, then the City would rely upon the zoning restrictions applicable to each use in order to protect the public, without requiring

Sears to close one of these operations. (Plaintiffs' EQP Motion at 13.) The plaintiffs assert that no other business is subject to multiple use restrictions added on top of the restrictions applicable to each single use. (*Id.* at 14.)

The Supreme Court has held that municipalities may use the content of sexually oriented entertainments as the basis for placing them in a different classification from other businesses. *Young*, 427 U.S. at 71. The same reasoning that supports the legal fiction that content-based regulations of adult entertainment to alleviate secondary effects is actually content-neutral under the First Amendment allows the distinction between adult and non-adult businesses to avoid strict scrutiny review under the Fourteenth Amendment. Because the *Renton* doctrine views such regulation as directed toward secondary effects rather than toward expressive conduct, no fundamental right is implicated. Thus, the classification in question is not between businesses that engage in protected expressive conduct and those that do not, but rather between businesses that cause harmful deleterious effects associated with adult entertainment and those that do not. For equal protection purposes, rational basis scrutiny applies. The City's policy to reduce the deleterious effects is a rational basis for the different treatment of adult entertainment businesses. Therefore, the plaintiffs' equal protection claim fails as a matter of law if the regulation is directed toward harmful secondary effects.

As indicated above in the First Amendment discussion, the Court finds that there is a genuine issue of fact as to whether the 1977 studies support the finding of harmful secondary effects from multiple adult entertainment uses within a single building. If the City fails to

meet its burden on this issue, then the ordinance must be examined as a content-based speech regulation under First Amendment strict scrutiny. Under that circumstance, the ordinance would also have to pass strict scrutiny under the Fourteenth Amendment as distinction based on exercise of a fundamental right.

The Court therefore denies both motions for summary adjudication on the issue of whether the ordinance violates the Fourteenth Amendment by treating persons differently based on the exercise of fundamental rights.

E. Due Process Vagueness and Overbreadth

1. Vagueness

The plaintiffs argue that in the event the Court rejects their facial challenge to the ordinance, they would not be able to conform their conduct to the requirements of the ordinance because it is unconstitutionally vague. (Plaintiffs' DP Motion at 2.) The plaintiffs contend that by defining an adult bookstore as an establishment which has adult materials "as a substantial portion of its stock-in-trade," the ordinance fails to provide fair notice of the conduct regulated. The plaintiffs contend that they cannot determine from the statute what ratio of adult to non-adult material would remove them from the scope of the ordinance. (*Id.*)

a. Standing and Ripeness

The City asserts that the plaintiffs do not have standing to assert vagueness because the plaintiffs have admitted that the ordinance applies to their businesses as

currently configured. (Complaint ¶ 84.) In *Young* and *Renton*, the Supreme court rejected similar vagueness claims on the grounds that the plaintiffs conceded that the ordinances clearly applied to them. *Young*, 427 U.S. at 59; *Renton*, 475 U.S. at 55 n.4. The Ninth Circuit has held that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Stoianoff v. State of Mont.*, 695 F.2d 1214, 1218 (9th Cir. 1983). Because there is no question as to the applicability of the ordinance to the plaintiffs, the Court rejects the vagueness challenge for lack of standing.

The plaintiffs argue that they will have standing if the preliminary injunction is lifted and they are faced with the task of bringing their businesses into compliance with the ordinance, or bringing their businesses out from under the definition of "adult entertainment." The fact that the plaintiffs have these choices in the event that they lose this lawsuit demonstrates that their vagueness challenge under this theory is not ripe for judicial resolution.

b. Merits

A statute is not impermissibly vague if it defines the offense with sufficient definiteness that ordinary people can understand what is prohibited, and it establishes standards to permit enforcement the law in a non-arbitrary, non-discriminatory manner. *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997). The plaintiffs cite declarations of zoning officers, made in the *Topanga Press* case, in which the officers testified that they did not

apply a numerical formula to determine when a portion of adult material was "substantial." (Garrou Decl. Exs. A, B and C.) The gist of these declarations is that the officers know an adult business when they see one.

There is no Ninth Circuit authority for the proposition that a zoning ordinance that requires case-by-case construction of a term like "substantial portion" is impermissibly vague. On the contrary, the Ninth Circuit in *Stoianoff* held that a drug paraphernalia statute was not impermissibly vague merely because its application depended on case-by-case determination of whether a particular item was "designed for use" as drug paraphernalia. 695 F.2d at 1220. "A definition which casts a wide net is necessary to accomplish the objectives of this Act." *Id.; see also Lydo Enterprises, Inc. v. City of Las Vegas,* 745 F.2d 1211, 1215 (9th Cir. 1984) (rejecting vagueness argument based on lack of " 'quantitative modifiers' " indicating what amount of adult material brings business within coverage of adult entertainment zoning statute).

Furthermore, the California courts have adopted a limiting construction of the "substantial portion" language. *Lucero,* 49 Cal. 3d 14, 259 Cal. Rptr. 740. In *Lucero,* the California Supreme Court rejected the California court of appeal's construction of the language to include a preponderance standard under which a use would not be covered unless the stock in trade of the business included more than 50% adult material. *Id.* at 741 (overruling *Pringle,* 115 Cal. App. 3d 151, 171 Cal. Rptr. 251). In place of the *Pringle* preponderance standard the court adopted " 'the regular and substantial course of conduct' standard." *Lucero,* 49 Cal. 3d at 19. Under the standard as applied to the adult theaters at issue in *Lucero,* the zoning

restrictions would "apply to all adult entertainment theaters offering adult fare as a substantial part of their regular business, but would not apply to theaters showing only occasional or incidental adult movies." *Id.* at 28.

The regular and substantial course of conduct standard can be applied to both the arcade and bookstore portions of the plaintiffs' businesses. The City argues that the zoning officials' declarations offered by the plaintiffs demonstrate that these officials have applied the regular and substantial conduct test in determining whether a business meets the ordinance's definition of adult entertainment. (Def. Opp. at 31.) Zoning official Eberhard testified that after the *Lucero* decision the department applied a number of objective factors: "One of the objective factors might be the amount of material available for sale. Another objective factor would be the placement and display of those materials. Another objective factor might be whether or not the establishment – how it represents itself in terms of advertising signs, or pieces of information." (*Id.* Ex. 26.) Based on this testimony, the Court concludes that the City has applied the *Lucero* standard to limit the meaning of "substantial portion" so that the language is not unconstitutionally vague.

2. Overbreadth

Overbreadth doctrine allows a person to whom a statute may be constitutionally applied to challenge the statute on the basis that it may unconstitutionally chill speech by others. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 411, 112 S. Ct. 2538, 2558 (1992) (White, J., concurring). Overbreadth doctrine is " 'strong medicine' " and should

not be applied unless the statute sweeps in a substantial amount of protected speech and is not susceptible to a limiting construction. *Id.*

The plaintiffs, however, have not properly raised an overbreadth issue. The plaintiffs argue that the statute is overbroad because it chills multiple uses for which the City does not have proper evidence of deleterious effects. This is not an overbreadth argument, but rather a restatement of the plaintiffs' time, place and manner argument that the ordinance is not justificable as a content-neutral regulation of speech. Overbreadth doctrine should not be applied when a case can be decided on narrower grounds. *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916 (1973) (noting that overbreadth doctrine is to be applied "sparingly and only as a last resort"). Because the court finds a genuine issue as to whether the ordinance serves a substantial government interest under the secondary effects doctrine, the Court need not analyze this ordinance for overbreadth. The ordinance's chilling effect on multiple uses is not a result of overbreadth. Multiple uses are the precise targets of the ordinance. The question in this case is whether this precise targeting is constitutional under the secondary effects doctrine.

The arguments which the plaintiffs mischaracterize as arising under the overbreadth doctrine should therefore be decided only as part of the time, place and manner analysis.

V. Conclusion

A. Abstention

Because there is no judicial proceeding pending against Alameda or Highland, the Court need not abstain on *Younger* grounds.

The court need not defer or stay the action under *Pullman* because the lawsuit involves a First Amendment issue which does not normally lend itself to *Pullman* abstention, and because there is no issue of state law whose resolution might make it unnecessary to reach the constitutional issues in this case.

Because no administrative or regulatory scheme is at stake in this case, the Court need not dismiss on grounds of *Burford* abstention.

B. Statute of Limitations

As to the issue of the statute of limitations, the Court denies the City's motion for summary judgment because the plaintiffs' alleged injuries arise out of continuing violations of their first Amendment rights, and therefore cannot be said to have accrued with the enactment of the multiple use amendment in 1983.

C. First Amendment

There remains a genuine issue of fact as to whether the combination bookstore/arcade is a single adult entertainment business, or whether the bookstore/arcade represents a "concentration" of separate adult entertainment uses whose secondary effects may be demonstrated by

the 1977 studies. Therefore, both motions for summary adjudication are denied as to the validity of the ordinance as a purportedly content-neutral regulation of secondary effects under *Renton* and *Young*.

1. Alternative Avenues of Communication

There remains a genuine issue of material fact as to whether the zoning scheme leaves open alternative channels of communication for either the bookstore or arcade uses.

D. Equal Protection

1. Selective Prosecution

The City has demonstrated that there is no genuine issue of fact as to whether the selective settlement policy violates equal protection. As a matter of law, the City may chose [sic] to settle some cases and prosecute others. The City's motion for partial adjudication is granted as to the selective prosecution equal protection violation.

2. Fundamental Rights

Because there remains a triable issue of fact as to whether the ordinance is a valid secondary effects regulation, there also remains a triable issue as to whether the ordinance violates equal protection based on exercise of a fundamental right. Therefore both motions for summary adjudication are denied as to this claim.

E. Due Process

1. Vagueness

Because the plaintiffs admit that the statute applies to them, there is no triable issue as to vagueness. The City's motion for summary adjudication is granted as to the vagueness issue.

2. Overbreadth

Because the plaintiffs' overbreadth argument is based not on the chilling effect of the ordinance on those not covered by its provisions, but rather on those covered, the Court need not reach the overbreadth question. Resolution of the First Amendment issues in the case will dispose of the overbreadth issue. Therefore, the Court grants the City's motion for summary adjudication of the overbreadth claims.

VI. Issues Remaining For Trial Or Future Motions

The Court's Standing Order requires the parties to prepare a joint proposed pre-trial conference order setting forth the issues remaining for trial. The court notes that the following issues have survived summary judgment:

1. Are the bookstore and arcade components of Alameda Books and Highland Books separate adult entertainment uses such that their "concentration" in a single building can be expected to cause the harmful secondary effects identified in the 1977 study?

2. Does the zoning scheme leave open reasonable alternative relocation sites for the adult entertainment uses displaced by the multiple use ordinance, or does the scheme have the effect of prohibiting either adult video arcades or adult bookstores throughout the City?

IT IS SO ORDERED.

Dated: 1-8-98

/s/ Dean D. Pregerson
DEAN D. PREGERSON
United States District Judge

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MAY 14, 2001 (9)

Supreme Court, U.S.
FILED
MAY 14 2001
CLERK

No. 00-799

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Is a city's zoning ordinance, which prohibits the operation of more than one adult entertainment business at a single location, including an adult bookstore and an adult arcade, invalid because the city did not study the negative effects of that particular combination of adult businesses, but rather relied on judicially approved statutory precedent from other jurisdictions?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, initially filed July 27, 2000, and as amended August 28, 2000, (App.[1] 1-21) is reported at 222 F.3d 719 (9th Cir. 2000). The District Court's Order granting, *inter alia*, plaintiffs' motion for summary judgment (App. 22-56) is unreported.

JURISDICTION

The amended decision of the Court of Appeals was entered on August 28, 2000. App. 2. Petitioner's Petition for Rehearing and Suggestion for Rehearing *en banc* was denied September 18, 2000. App. 59. The Petition for Writ of Certiorari was filed on November 17, 2000, and was granted on March 5, 2001. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Los Angeles City Ordinance Nos. 151294, 157538 and 158579 are reprinted in their entirety at App. 59-81.

The First Amendment to the Constitution of the United States provides in pertinent part that:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

[1] Petition Appendix.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1983 of Title 42 of the United States Code provides in pertinent part that:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

A. The City Of Los Angeles Adult Entertainment Ordinance.

Following this Court's decision in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (*Young*), the Los Angeles City Council instructed the Planning Department to undertake a study "to determine whether and to what extent the concentration of . . . adult businesses has a blighting and degrading effect upon the neighborhoods in which they are situated." App. 60. The City Council allocated $25,000 for the study and "all other projects

under study" were delayed for the three to four months the study would take to complete. JA[2] 170.

In June, 1977, the Planning Department completed a comprehensive study entitled "Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles"[3] ("1977 Study"). The 1977 Study "encompassed all forms of 'adult entertainment.' " JA 58. The Police Department submitted a report[4] comparing the crime statistics for the Hollywood area to the crime statistics citywide for the years 1969-1975, where the number of adult businesses "proliferated from a mere 11 establishments to an astonishing number of 88 such locations." JA 177. The Hollywood area reported significant increases over the citywide average for crimes (JA 175 -176), arrests (JA 176) and deployment of police personnel. JA 176-177. These "overwhelming" increases "are all representative of the blighting results that the clustering of Adult Entertainment Establishments has on the entire community." JA 177.

General questionnaires were mailed to businessmen and residents in the studied areas and a second questionnaire was sent to real estate professionals. JA 99-111. Real estate appraisers indicated that the clusters of adult businesses "had a direct negative impact on property values." JA 91. Businessmen reported that concentrations of adult

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[2] Joint Appendix, consisting of two volumes: Volume I, pages 1-183 and Volume II, pages 184-306.

[3] Found at JA 35-162 (Volume I).

[4] The text and section one of that report is at JA 173-183 (Volume I). The 1977 Study excerpts and summarizes that report at JA 120-133.

businesses negatively impacted their patronage, their ability to recruit employees and lead to difficulty in renting office space or retaining desirable tenants. JA 104. "A high percentage of respondents report they do not feel safe in such areas." JA 105.

Two public hearings were held by the Planning Department, one in Hollywood and one in Northridge (in the San Fernando Valley).[5]

JA 92. "The most prevalent type of comment at the Hollywood meeting was an expression of fear walking in areas where 'adult entertainment' and related business [sic] are concentrated." JA 92.

The 1977 Study documented that the concentration of adult entertainment businesses results in increased crime, adversely impacted property values, and generally caused blight and other negative impacts in the neighborhoods where adult businesses concentrate. After making detailed findings supporting a dispersal type of ordinance modeled on the Detroit ordinance approved in *Young* (JA 42-46), the 1977 Study recommended that if an ordinance is adopted that there be a separation between adult businesses greater than 1000 feet and a separation from traditionally protected land uses such as places of religious worship, schools and parks of at least 500 feet. JA 41.

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[5] A summary of the Hollywood meeting is at JA 94-97. A summary of the Northridge meeting is at JA 97-98.

On July 18, 1978, the City Council enacted Ordinance No. 151294 adding § 12.70 to the Los Angeles Municipal Code.[6] App. 60-69.

That Ordinance added § 12.70 C to the Los Angeles Municipal Code which provided:

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[6] Pertinent to this lawsuit, that ordinance defined an adult arcade and adult bookstore:

> Section 12.70 B (1) defined an adult arcade:
>
> " 'Adult Arcade' – An establishment where, for any form of consideration, one or more motion picture projectors, slide projectors or similar machines, for viewing by five or fewer persons each, are used to show films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified anatomical areas.' " App. 62
>
> Section 12.70 B (2) defined an adult bookstore:
>
> " 'Adult Bookstores' – An establishment which has as a substantial portion of its stock-in-trade and offers for sale for any form of consideration any one or more of the following:
>
> "(a) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified anatomical areas;' or
>
> (b) Instruments, devices or paraphernalia which are designed for use in connection with 'specified sexual activities.' " App. 62.

These definitions have not been amended since their adoption and are not challenged here. Plaintiffs do not deny that they are operating both an adult bookstore and adult arcade at the same location within the meaning of the ordinance.

> "No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theater, Adult Theater, Massage Parlor or Sexual Encounter Establishment within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park within the City of Los Angeles." App. 67.

Section 12.70 D was added to the Code and provided, in pertinent part:

> "The distance between any two adult entertainment businesses shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of each business." App. 67.

In 1982, City officials discovered that the "measurement of distance" provision, subsection D, *supra*, was being interpreted "in such a manner as to permit a combination of such businesses to be located within the exterior structural walls of a single building at one site." JA 29. The intent in originally adding § 12.70 to the Municipal Code "was to provide for the dispersion of all adult entertainment business in the City," and thus "it is quite apparent that the Council in no way intended to allow more than one such business to be established at a single location in the same building." JA 29. A motion was introduced to amend § 12.70 in order to remove any ambiguity about the Council's intent to disperse all adult entertainment businesses. JA 28.

The staff report prepared by the Planning Department described the need for the ordinance as follows:

> "The intent of the City Council in enacting the existing adult entertainment zoning regulations in 1978 was to provide for the dispersion of *all* adult entertainment business in the City. *This being the case, it is quite apparent that the Council in no way intended to allow more than one such business to be established at a single location in the same building.* However, the . . . language [in § 12.70] relating to the measurement of distances . . . has resulted in an ambiguity with respect to the number of businesses which may be permitted within the 'exterior structural wall' of an establishment at one location. . . . Thus the need has arisen to enact the . . . subject proposed ordinance." JA 29, emphasis added.

Further, the report stated that "[e]nactment of the subject ordinance is necessary to clarify, on a permanent basis, existing provisions of the Adult Entertainment Zoning regulations contained in Section 12.70 of the Municipal Code. It is apparent that in enacting these regulations in 1978, the City Council did not intend to permit more than one adult business in the same building at one location." JA 31. At the time the City considered this matter, there was precedent supporting a regulation prohibiting two or more adult businesses at a single site, *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980) (*Hart*). *Hart* analyzed a North Carolina statute prohibiting two or more adult businesses at a location under this Court's *Young* decision, concluding that such a prohibition did not offend the First Amendment because it was a time, place and manner regulation. *Id.* at 826.

On March 16, 1983, the City Council adopted Ordinance No. 157538 (App. 70-76), amending § 12.70 to add

§ 12.70 B (17) to *expressly* prohibit more than one of the previously defined adult entertainment businesses at the same location and to make clear that "each shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." App. 70-71. Section 12.70 C was also amended at that time to expressly prohibit more than one adult business in one building. App. 71. Ordinance 158579 (App. 77-81), enacted December 16, 1983, further clarified the legislative intent and resulted in the current version of the first paragraph of § 12.70 C,[7] which is the subject of this litigation. Subsection C provides:

> "No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an adult entertainment business within 1,000 feet of another adult entertainment business or within 500 feet of any religious institution, school or public park within the City of Los Angeles. No person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof, or the increase of floor area of any adult entertainment business in any building, structure or portion thereof containing another adult entertainment business." App. 77.

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[7] This provision of § 12.70 C has been referred throughout this litigation as either the "multi-use prohibition" or the "multiple use prohibition."

B. The Two Plaintiffs.

After the adoption of the code amendment specifically prohibiting two adult businesses at a single location, Alameda Books commenced operation as an adult video arcade in 1987 and closed in 1990. JA 20. It reopened in 1993 at a different site within the same shopping center as an adult video arcade and adult bookstore. JA 21. The adult video arcade has 15 video machines, each located in a separate booth. JA 227. Alameda Books admits that it has "been openly operating in violation of this provision since approximately November of 1993." JA 22.

Highland Books began operation as an adult video arcade in 1987 and commencing in June, 1991, it also began operating as an adult bookstore at the same location. JA 20. The adult video arcade has 19 video machines, each located in a separate booth. JA 227. Highland Books admits that it "has been openly operating in non-compliance with this 'multiple-use prohibition' since June, 1991."[8] JA 22.

C. The Proceedings Below.

Plaintiffs filed their Complaint for Declaratory Relief and Injunctive Relief Under 42 U.S.C. § 1983 on November 15, 1995. The First Cause of Action was for "Declaratory And Injunctive Relief Under 42 U.S.C. § 1983 To Prevent Threatened Enforcement Of Portions Of L.A.M.C.

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[8] Further, the plaintiffs waived any argument that an adult arcade cannot economically operate independent of an adult bookstore. JA 250-252, 274.

§ 12.70 Prohibiting Two Or More Adult Entertainment Businesses In Same Building." The City filed its answer on March 8, 1996. The parties filed cross-motions for summary judgment or summary adjudication of the issues which were argued on October 20, 1997. JA 253-254. In an Order filed January 11, 1998, the district court denying, *inter alia*, plaintiffs' motions for summary judgment and denying in part and granting in part the City's motion for summary adjudication. JA 253-306. The court considered two issues as surviving summary judgment. First was whether the adult bookstore and adult arcade were "separate adult uses such that their 'concentration' in a single building can be expected to cause the harmful secondary effects identified in the 1977 study." JA 305. Also set for trial was whether the City's ordinance left open reasonable alternative sites for adult entertainment uses. JA 306.

Plaintiffs filed motions to reconsider the First Amendment portion of the district court's Order of January 12, 1998. App. 22-23. The Court heard oral argument on April 13, 1998 (App. 23), and on May 28, 1998, issued a new order granting the motion for reconsideration of the First Amendment portion of the previous order. App. 22. The new order vacated the prior order denying summary judgment (App. 54) and granted plaintiffs' motion for summary adjudication of the First Cause of Action. App. 55. The court concluded that the City's prohibition on two or more adult businesses in the same building was not a content neutral secondary effects regulation and was therefore an invalid prior restraint. App. 54. The new order rendered moot the remaining causes of action in the complaint (App. 54) including whether the disputed City

prohibition allowed "for reasonable alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (*Renton*).

Judgment was entered for the plaintiffs, and an injunction against the enforcement of § 12.70 C was granted. App. 57-58.

The Court of Appeals for the Ninth Circuit affirmed. App. 3. Although the court conceded that the City had a substantial government interest in reducing crime in its neighborhoods, it held that the City failed to prove that the prohibition against more than one adult business at a single location served that interest. App. 11-12. The court determined that the 1977 Study was insufficient to show that an adult arcade and adult bookstore at a single location contributed to the negative secondary effects caused by the concentration of such businesses identified in the 1977 Study. *Id.* The court therefore concluded that it was unreasonable for the City to conclude that an adult bookstore and an adult video arcade at a single location would have harmful secondary effects. App. 15.

SUMMARY OF THE ARGUMENT

This case involves the evidentiary standard necessary to support a municipal zoning ordinance regulating the spacing of adult entertainment businesses. This is not "the first case in this Court in which the interests in free expression protected by the First and Fourteenth Amendments have been implicated by a municipality's commercial zoning ordinance" as was *Young*. 427 U.S. at 76

(Powell, J., concurring). It is, however, otherwise indistinguishable from that seminal decision. Moreover, the Ninth Circuit's decision directly conflicts with this Court's decision in *Renton* which, in reaffirming *Young*, rejected a rigid evidentiary standard of proof in favor of evidence which the municipality "reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52. Further, *Renton* did not require a city to prove that a specific business or a combination of businesses caused harmful secondary effects, as did the court of appeals, only that the "category" of adult businesses "produce the unwanted secondary effects." 475 U.S. at 52.

The often stated doctrine of this Court is that each forum of expression under the First Amendment is *sui generis* and properly analyzed by the case law applicable to that forum:

> "This Court has often faced the problem of applying the broad principles of the First Amendment to unique forums of expression. (Citations omitted.) Even a cursory reading of these opinions reveals that at times First Amendment values must yield to other societal interests. These cases support the cogency of Justice Jackson's remark in *Kovacs v. Cooper*, 336 U.S. 77, 97, 69 S.Ct. 448, 458, 93 L.Ed. 513 (1949): Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500-501 (1981) footnote omitted. *Accord, Renton*, 475 U.S. at 49, quoting *Young*, 427 U.S. at 82 (Powell, J, concurring).

This case is concerned with the law of zoning, governed by the principles first enunciated in *Young* and subsequently affirmed in *Renton*. In *Young*, this Court "held that the city of Detroit's zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other 'regulated uses' or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments." *Renton*, 475 U.S. at 46.

Justice Powell in his concurrence in *Young* not only recognized that "zoning has become an accepted necessity in our increasingly urbanized society," but also that "zoning restrictions have taken on forms far more complex and innovative" than when zoning ordinances were first upheld by this Court in the 1920's. *Young*, 427 U.S. at 74 (Powell, J., concurring). Justice Powell concluded "that zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.'" 427 U.S. at 80, quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

In *Renton*, this Court built on the *Young* framework and held that a city was not required to make particularized findings regarding the secondary effects of adult businesses within the city itself, but rather could rely on the experiences of other cities. 457 U.S. at 51. The evidence a city relies upon need only be "reasonably believed to be relevant to the problem the city addresses." *Id.* at 51-52. Under this deferential evidentiary standard, a city is permitted "a reasonable

opportunity to experiment with solutions to admittedly serious problems." *Id.* at 52, quoting *Young*, 427 U.S. at 71.

Thus, both *Young* and *Renton* stand for the proposition that municipalities have broad authority, consistent with the First Amendment, to regulate the location of adult entertainment businesses through municipal zoning ordinances. Under this Court's precedent applicable to the regulation of adult businesses through the zoning power, all that need be shown here to uphold the constitutionality of the City's regulation are: (1) that the City's regulation does not ban adult businesses, and therefore can be considered "as a form of time, place and manner regulation" (*Renton*, 475 U.S. at 46); (2) that the regulation is content neutral, that is, it is not aimed at the content of the material but rather addresses the secondary effects those businesses have on the surrounding community (*id.* at 47); and (3) that ordinance is designed to serve a substantial governmental interest.[9] *Id.* at 50. The Ninth Circuit, however, stumbled over the proper application of these three factors and in doing so misinterpreted this Court's First Amendment intermediate scrutiny jurisprudence.

The Ninth Circuit required the City to prove based on empirical evidence that a combination of adult businesses in one building actually contributes to the harmful secondary effects caused by the concentration of adult

[9] The fourth *Renton* factor, whether the regulation "allows for reasonable alternative avenues of communication" (at 475 U.S. 50) is not before the Court. Petition, App. 54-55.

businesses that were identified in the City's 1977 Study. App. 15. The City relied on its earlier study and *Hart*, *supra*. However, because the City's 1977 Study did not *specifically* consider the impact of more than one adult business in one building, there was, according to the lower courts, no evidence to support the regulation when it was enacted by the City Council. The City was required to prove "the impact of individual adult entertainment business units" in a single building, whereas the 1977 Study only showed "the impact of a concentration of such business units in small geographic areas." App. 12. This reasoning, however, is inherently contradictory and circular, since a concentration of adult businesses *in one building* is a concentration of adult businesses units *in a small geographic area*.

Moreover, both lower courts (App. 19-21 and App. 45-47) did not address this Court's approval of the City of Renton's reliance on the findings contained in a decision of the Supreme Court of Washington which formed the evidentiary basis for Renton's zoning ordinance, which this Court concluded was reasonable. 475 U.S. 50-51. It is therefore difficult to conclude, as did the Ninth Circuit, that Los Angeles' reliance on *Hart* is unreasonable under the First Amendment. App. 21.

This Court has decided that local governments may enact zoning regulations of adult businesses without subjecting the regulation to the strict scrutiny standard of First Amendment review. In the zoning context, the intermediate standard of First Amendment review is one of reasonableness, deferring to legislative judgments on how to remedy the identified problems. It is, therefore, no surprise that this Court has consistently relied on its

decision in *Renton* for the proposition that courts should defer to legislative fact finding in many areas of great constitutional importance. See, e.g., *Nixon v. Shrink Missouri Government Pac.*, 528 U.S. 377, 393 (2000) (state limits on contributions to political campaigns); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (limitations on attorney advertising). The same standard applies here.

A second flaw in the court of appeals' decision was its rather cavalier dismissal of the City's reliance on *Hart, supra*. App. 20. Both the district court (App. 45) and the court of appeals (App. 19) agreed that the regulation in *Hart* prohibiting two or more adult businesses in the same building was identical to the City's regulation challenged in this case. Both courts dismissed *Hart* because it was decided before *Renton* and was contrary to Ninth Circuit precedent. App. 19 and 45. Both lower courts studiously ignored the fact that *Hart* was decided after *Young* and that its analysis upholding the North Carolina regulation at issue there "parallels and draws from the *Mini Theatres* analysis." *Hart*, 612 F.2d at 824. Even a cursory analysis of *Hart* shows that, although it pre-dated *Renton*, it is fully consistent with *Renton*. *Hart's* reasoning is persuasive and any Ninth Circuit precedent to the contrary, real or imagined, is suspect, not *Hart*.

This Court's precedent establishes a deferential evidentiary burden on a city to justify a zoning ordinance regulating the location of adult businesses. That evidentiary burden does not require evidence independent of that which already exists, and it is entirely appropriate to rely on the experiences of other cities as detailed in their studies or through case law relating those experiences to meet that burden. Because the court of appeals did not

apply the correct standard of proof contained in this Court's precedent, the answer to the question presented is obvious, the City's zoning regulation prohibiting more than one adult business is not invalid because of any evidentiary failure, and the Court should reverse the judgment of the Ninth Circuit.

ARGUMENT

A. The Evidentiary Burden Imposed On The City By The Court Of Appeals To Justify Its Prohibition Of More Than One Adult Business At A Single Location Is Contrary To *Renton*.

1. The Court Of Appeals Imposed A Greater Evidentiary Burden On The City Than Required By *Renton*.

There are two aspects to the burden of proof necessary to justify a zoning regulation under *Renton* and *Young*. The first is the amount or quantum of evidence necessary to show that adult businesses result in undesirable secondary effects. The second is the amount of deference the courts should give to local governments in designing regulations to combat those secondary effects. The court of appeals required specific findings relating the particularized contribution of the businesses sought to be regulated, a significant evidentiary burden. App. 12-13. Given this rigid evidentiary standard, that court gave little deference to the City's legislative judgment.

That evidentiary burden, imposed by the Ninth Circuit in this case in 2000, is the same "unnecessarily rigid burden of proof" which that court imposed in its 1984

decision, *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir. 1984). There were no adult movie theaters in the City of Renton when that ordinance was enacted. 475 U.S. at 44. The Ninth Circuit in 1984 required a specific showing of harm by Renton (748 F.2d at 537), which obviously could not be made if there were no adult businesses in that city. That standard was specifically rejected by this Court in *Renton*. 475 U.S. at 50. Rather, this Court established a far more reasonable standard for legislative fact finding and judgments in adopting zoning regulations regulating adult businesses when it required only evidence that was "reasonably believed to be relevant." 475 U.S. at 51.

The proper evidentiary burden that should be placed on a city to justify its zoning regulations was set forth in *Renton*: "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52. This burden precludes the particularized showing required by the court of appeals in this case. Moreover, this deferential standard includes the ability of the municipality to provide post-enactment justification for its ordinance. 475 U.S. 45 ("While the federal action was pending, the City Council amended the ordinance . . . adding a statement of reasons for its enactment. . . . ").

Having evidence before it of "Seattle's identification of the secondary effects" as well as "the relevance of Seattle's experience to Renton" this Court could find "no constitutional defect in the method chosen by Renton to

further its substantial interests." 475 U.S. at 52. This Court then deferred to the Renton City Council's regulatory determinations:

> " 'It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas . . . [T]he city must be allowed reasonable opportunity to experiment with solutions to admittedly serious problems.' " 475 U.S. at 52, quoting *Young*, 427 U.S. at 71 (plurality opinion).

2. This Court Has Not Abandoned The *Renton* Standard.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court rejected a challenge to a regulation prohibiting the rental of a room at an adult motel for fewer than 10 hours. *Id.* at 236. This Court found Dallas' reliance on the Los Angeles 1977 Study, which "considered cursorily the effect of adult motels on surrounding neighborhoods," plus the legislative judgment that short-time rentals fostered prostitution and criminal activity which the Dallas ordinance sought to suppress, to be "adequate." *Id.* Indeed, that legislative judgment was held to be reasonable on minimal evidence. *Id.* The court of appeals in that case, *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988), dismissed the need for Dallas to make specific findings that adult motels "engendered the same effects on property values and crime as do other sexually oriented businesses" because the "City's interest [was] self-evident and substantial." 837 F.2d at 1304. This Court agreed. As with Dallas, Los Angeles' interest is self-evident and substantial. Any requirement that specific

findings must be made to justify the City's zoning regulation is disproved by *FW/PBS*.

3. This Court Has Imposed The Same Deferential Evidentiary Standard In Other First Amendment contexts.

In *Metromedia, Inc., supra,* this Court considered a challenge to the City of San Diego's ordinance regulating billboards and upheld the legislative determination that billboards constituted traffic hazards and denigrated San Diego's aesthetic interests, 453 U.S. at 509-510, stating:

> "We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable." *Id.* at 509 (plurality opinion).[10]

Further, the plurality opinion went on to state that:

> "We reach a similar result with respect to the second asserted justification for the ordinance – advancement of the City's esthetic interests. It is not speculative to recognize that billboards by their very nature wherever located

[10] Although this and the following quote are from the plurality opinion, seven Justices agreed with the legislative judgment that billboards contribute to the traffic hazards and visual blight which justified the total ban of off site billboards. *See, id.*, at 549-553 (Stevens, J., dissenting in part); *id.* at 560-561 (Burger, C.J., dissenting); and *id.* at 570 (Rehnquist, J, dissenting).

> and however constructed, can be perceived as an 'esthetic harm.' " *Id.* at 510.

Here, Los Angeles undertook a well-regarded study that established a causal connection between adult businesses and significant adverse secondary effects. If, under this Court's precedent, legislative judgments can be properly based on the "accumulated, common-sense judgments of local lawmakers and of the many reviewing courts," then certainly the legislative judgment should be sustained where, as here, that judgment is based on the City's own study. That was the lesson of *Young* and *Renton* ignored by the court of appeals.

In *Nixon v. Shrink Missouri Government Pac., supra,* this Court relied on *Renton* for the proposition that Missouri was not required to produce new studies or evidence independent of that already in existence when it upheld a Missouri statute limiting campaign contributions to state political candidates. The respondents argued to this Court that there must be "empirical evidence of actually corrupt practices or of a perception among Missouri voters that unrestricted contributions must have been exerting a covertly corrosive influence" in order to justify Missouri's regulations. 528 U.S. at 390-391. This Court specifically rejected that argument (*id.* at 391-392), even though the standard of review was "heightened judicial scrutiny" (*id.* at 391), not the intermediate scrutiny "standard applicable to merely time, place, and manner restrictions." *Id.* at 386.

The record in that case did "not show that the Missouri Legislature relied on the evidence and findings

accepted in *Buckley*."[11] 528 U.S. at 393. This Court permitted Missouri to rely on a post-enactment affidavit from a state senator setting forth the reasons for the statute, and the district court cited to newspaper articles and editorials describing the corrupting influence of large campaign contributions in order to defend the legislative judgement at trial. *Id.* This Court determined that the record was sufficient to show that the same "congressional concerns reflected in *Buckley* has its counterpart supporting the Missouri law." *Id.* The Court only required that whatever evidence was introduced in support of the Missouri statute "was reasonably believed to be relevant to the problem [Missouri] addresses." *Id.* at 394 fn. 6, quoting *Renton*, 475 U.S. at 51-52.

It is fair to say that the evidence to support the City's zoning regulation in this case is far 'greater' than the evidence proffered by Missouri in *Nixon v. Shrink*, a case where the standard of review was "heightened judicial scrutiny." *Id.* at 391. There is more than just "some" evidence here that prohibiting more than one adult business at a location serves a substantial governmental interest. To require more, as did the Ninth Circuit, gives owners and operators of adult businesses greater protection under the First Amendment than campaign contributors. The standard of review imposed by the court of appeals is incompatible with the evidentiary standard set by this Court with respect to zoning regulations for adult businesses because "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political

[11] Referring to *Buckley v. Valeo*, 424 U.S. 1 (1976).

debate that inspired Voltaire's immortal comment."[12] *Young*, 427 U.S. 70 (plurality opinion).

Similarly, in *Florida Bar v. Went For It, Inc., supra*, this Court upheld regulations of the Florida Bar which "prohibit[ed] personal injury lawyers from sending targeted direct mail solicitations to victims and their relatives for 30 days following an accident or disaster." 515 U.S. at 620. The purpose of these rules was "to curb[ing] activities that 'negatively affec[t] the administration of justice' " (*id.* at 624) and followed a two year study "of the effects of lawyer advertising on public opinion." *Id.* at 620. The Court characterized the Bar's interest in preserving the integrity of the legal profession as "substantial." *Id.* at 625.

The Florida Bar submitted a 106 page summary of its two-year study to the district court that contained statistical and anecdotal evidence to support its position that "the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession." *Id.* at 626. This Court commented that "[t]he anecdotal record mustered by the Bar is noteworthy for its breadth and detail" (*id.* at 627) and included newspaper editorials and excerpts from numerous complaints about this practice. *Id.* at 627-628. Relying in part on *Renton*, this Court found that showing sufficient to support the regulations, stating:

> "Indeed, in other First Amendment contexts we have permitted litigants to justify speech

[12] "I disapprove of what you say, but I will defend to the death your right to say it." 427 U.S. at 63.

> restrictions by reference to studies and anecdotes pertaining to different locales altogether, (citations omitted), or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.' " *Id.* at 628, citation omitted.

The Florida Bar regulation was found valid because the record showed that it "target[ed] a concrete, nonspeculative harm." *Id.* at 629. Similarly here, the record shows that the City's zoning regulation prohibiting more than one adult business at a single location equally targets a concrete, nonspeculative harm: that the concentration of adult businesses in small geographic areas cause adverse secondary effects. Under the rationale of *Young*, *Renton*, and this case, the Los Angeles zoning regulation prohibiting more than one adult business at a location passes First Amendment intermediate scrutiny analysis.

Also illustrative of this Court's intermediate scrutiny jurisprudence is the interplay between this Court's decisions in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*) and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*) which concerned the constitutionality of the "must carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992,[13] an area in which "society's interest" is of a far greater "magnitude" than "erotic materials that have some arguably artistic value." *Young*, 427 U.S. at 70 (plurality opinion).

In *Turner I*, after undertaking an analysis of the Cable Act and the evidence before the district court, the Court

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[13] 47 U.S.C. §§ 534(b)(1)(B), (h)(1)(a) and 535(a).

remanded the case "to develop a more thorough factual record" before "passing upon the constitutional validity of the challenged provisions." 512 U.S. at 668 (plurality opinion).[14] The plurality desired "a more substantial elaboration . . . of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence [on the financial difficulty of stations dropped by the cable operators]." *Id.* at 667.

However, in remanding, the plurality stated that "courts must accord substantial deference to the predictive judgments of Congress" because it "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here." *Id.* at 665-666, internal quotes and citation omitted. These predictive judgments were, of course, subject to the independent judgment of the courts, but in doing so:

> "This obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own. Rather, it is to assure that in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence. See *Century Communications Corp. v. FCC* 835 F.2d 292, 304 (CADC 1987) ('[W]hen trenching on first amendment interests, even incidentally, the government must be able to adduce

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[14] Justice Stevens concurred in the judgment, although he was of the view the judgment of the district court should be affirmed. 512 U.S. 675.

either empirical support or at least sound reasoning on behalf of its measure.')."[15] 512 U.S. at 666.

On remand, the district court considered additional evidence, which included industry documents obtained after remand, expert testimony and "studies and anecdotal evidence." *Turner II*, 520 U.S. at 187. This Court again confirmed that "courts must accord substantial deference to the predictive judgments of Congress" (520 U.S. at 195, quoting *Turner I*, 512 U.S. at 665), recognizing that factual support for the legislative judgment or prediction is often not possible or even required, but involves deductions based upon expert knowledge. 520 U.S. at 196.

The ultimate question then is not whether the legislative decision is objectively correct, but "whether the legislative conclusion was reasonable and supported by substantial evidence." *Id.* at 211. Therefore, it is not relevant that the evidence is in conflict since it is entirely possible to draw inconsistent conclusions from the same evidence. *Id.*

Lastly, these cases also reject the notion of the court of appeals that the only evidence available to the City to justify its regulation is the evidence before the legislative body at the time the regulation was adopted. App. 11-14. Clearly, this Court's precedent permits the introduction of post-enactment evidence at trial to support the constitutionality of a regulation challenged under the First

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[15] Justice Stevens in his concurrence agreed with this formulation. 512 U.S. 670 fn. 1.

Amendment. That evidence can include anecdotal and historical evidence, case law or other studies.

4. The Los Angeles Zoning Ordinance Challenged Here Meets The Evidentiary Burden Imposed By *Renton*.

The record before the Los Angeles City Council in 1978, and again in 1983 when the ordinance was amended, to explicitly prohibit two adult businesses at one location, was substantial. Although Los Angeles based its ordinance on Detroit's ordinance approved by this Court in *Young*, it was not a slavish imitation. The 1977 Study recommended that the ordinance "be designed for specific application in the City of Los Angeles." JA 41. So, unlike Detroit, which included adult movie theaters in its Anti-Skid Row ordinance along with pawn shops, taxi dance halls, pool rooms and shoe shine parlors, *Young*, 427 U.S. at 53 fn 3, Los Angeles required the dispersal of eight defined adult businesses from each other and distanced from traditionally protected sensitive land uses. App. 67. What each city had in common was the primary purpose of its ordinance: "preventing a concentration of these uses in any one area (i.e., not more than two such uses within one thousand feet of each other which would create such adverse effects.)" 427 U.S. at 55 fn 6, quoting the Detroit ordinance. When it became apparent that there was ambiguity in the meaning of the ordinance, the City Council closed the loophole. Had someone in Detroit developed a theory to permit multiple restricted uses in one building, Detroit officials may well have acted in the same manner as those in Los Angeles to remove any ambiguity. The 1983 amendment is clearly

consistent with, and logically related to, the original intent of the City Council that all adult businesses must be separated from each other. Indeed, this Court recognized that it was reasonable to assume that the City of Renton would amend its ordinance to include other adult businesses in addition to adult movie theaters should the need arise. *Renton*, 475 U.S. at 53-54.

The record before the district court demonstrated that the City's adult businesses ordinance was consistent with existing City zoning practices. Historically, Los Angeles has regulated arcades, which are places of amusement, separately from bookstores and other retail establishments because arcades have greater land use impacts. JA 186. Concerned about the increased negative effects associated with concentrating a "number of businesses at one site," the City's zoning regulations impose "special regulations for 'mini-malls.' " JA 187. The City has required the dispersal of fast food establishments in certain areas of the City to mitigate the impacts associated with their proliferation, as well as imposing minimum distance separation between off-site billboards. JA 188. The City made a zoning decision to disperse all adult businesses and incorporated those regulations into the fabric of the City's zoning provisions, much in the same way that Detroit's regulation of adult movie theaters fit into the fabric of that city's Anti-Skid Row ordinance.

Moreover, the 1977 Study confirms what has been shown by history and case law, that left unregulated arcades and adult arcade/bookstore combinations cause significant negative effects. *Renton* would permit the City's regulation on this basis alone, independent of the City's 1977 Study.

Adult video arcades have long been recognized as independent targets of regulation because their "patrons are not expected to enter with the solemnity of a business visitor at a mercantile establishment." *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243, 1246 (9th Cir. 1982), quoting *EWAP, Inc. v. City of Los Angeles*, 97 Cal.App.3d 179, 189-190, 158 Cal.Rptr. 579, 585 (1979), quoting *People v. Perrine*, 47 Cal.App.3d 252, 258, 120 Cal.Rptr. 640, 643-644 (1975). Evidence was introduced at trial showing the long history of problems associated with arcades (JA 189-222), including a picture of an Edison Phonograph and Kinetoscope Parlor in Los Angeles dated 1896. JA 195. Early on, there were complaints concerning the safety, hygiene and lighting of these establishments. JA 200. Equally early on, the more risque' "videos" for those times were the more popular offerings. JA 207. "Their first patrons were often tramps and drunks. The respectable shuttered away from them and murmured against them. It began to be said that something ought to be done about policing them or maybe banning them altogether." JA 209.

Adult bookstore/video arcade combinations are also the subject of litigation because of their ability to become public nuisances. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). The City of Los Angeles has its own very real history with the tendency of these combination businesses to create negative secondary impacts on neighboring properties. *E.W.A.P., Inc. v. City of Los Angeles*, 56 Cal.App.4th 310, 65 Cal.Rptr.2d 325 (1997) (adult bookstore/arcade which opened in 1972 was a source of nuisance abatement actions activities since at least 1987,

subject to City's nuisance abatement ordinance notwithstanding plaintiff's connection to the First Amendment.).

There is no requirement under *Young* and *Renton* that local officials stand by and wait until adult businesses become public nuisances before a City can regulate the undesirable impacts associated with those businesses. There was empirical evidence in the record before the City Council that concentrations of adult businesses cause unwanted secondary effects, and that those negative impacts can be ameliorated by the application of sound planning and zoning principles.

The case law, federal and state, is an instructive history of the deleterious impacts adult businesses have in the real world. The Los Angeles City Council, before and after 1978, was well versed in the problems caused by the concentration of adult businesses, and it was reasonable for it to conclude that restricting one adult business to a location responds to the needs of the City and is logically related to the legislative ends desired by the City Council.

This Court has authorized cities to regulate adult businesses through their zoning ordinance. The City is free to disperse them as in *Young*, or concentrate them as in *Renton*. Los Angeles has, based upon substantial evidence, adopted a method of dispersing adult businesses which meets the specific needs of Los Angeles. As in *Renton*, this Court should "find no constitutional defect in the method chosen by [Los Angeles] to further its substantial interests." 475 U.S. at 52. It is not the function of the courts "to appraise the wisdom of [the city's] decision," but rather to allow cities "a reasonable opportunity

to experiment with solutions to admittedly serious problems." *Id.*, quoting *Young*, 427 U.S. at 71 (plurality opinion), internal quotes omitted. The Ninth Circuit did not agree with the wisdom of the City's regulation and denied Los Angeles a reasonable opportunity to experiment based upon its own needs. In doing so, it forgot what it had said in another context: that courts should "leave the fine-tuning of the distance requirement to the legislative body." *Colacurcio v. City of Kent*, 163 F.3d 545, 554 (9th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000) (upholding a ten foot separation between patrons and exotic dancers at an adult nightclub).

B. The Rationale And Result In *Hart Book Stores, Inc. v. Edmisten* Is Fully Consistent With This Court's Precedent And Reflects The Analysis That Should Have Been Undertaken By The Court Of Appeals In This Case.

Without analysis or much comment, the court of appeals, as did the District Court, dismissed out of hand the City's reliance on *Hart, supra*, because the case was decided before *Renton* and was inconsistent with Ninth Circuit precedent. App. 20. The City's Petition fully discusses how *Hart* predicts, and is consistent with, this Court's reasoning and decision in *Renton* in almost all respects (Petition at 19-21) and need not be repeated here. *Hart*, however, is more supportive of the City's regulation than just being prescient.

The Ninth Circuit dismissed *Hart* because of its lack of a formal legislative history to support the North Carolina statute prohibiting more than one adult business at

the same location. App. 20. Equally upsetting to the court below was the seeming deference given by the *Hart* court to the legislative judgment, which held that the North Carolina regulation could not be considered "unreasonable." Simply put, if a court of appeals could think a legislative judgment reasonable on a minimal legislative record, how can it be any less reasonable with an extensive legislative history before the legislative body which supports the same conclusion? It was, after all, a portion of the Los Angeles legislative history, the 1977 Study, which led to the conclusion that the North Carolina statute was reasonable. *Hart*, 612 F.2d at 829 n. 10.

Hart is also consistent with this Court's deferential approach to legislative judgments in this context by permitting the courts to rely on post enactment evidence. The district court in striking the North Carolina statute gave little weight to the only evidence before the legislature, a declaration from the Director of the Wake County Department of Public Health describing the conduct of the patrons "in businesses like plaintiffs." *Hart Book Stores, Inc. v. Edmisten*, 450 F.Supp 904, 907 (E.D.N.C. 1978). In reversing, the court of appeals stated that "[w]hile there is no formal legislative history of the law, the record does show that the sponsor of the legislation was concerned to bring these secondary effects to the legislature's attention." *Hart*, 612 F.2d at 828. After quoting from the report presented to the Legislature to show what those secondary effects were (*id.* at 828-829 fn 9), the court concluded that the "dispersal of the marketing activities might ameliorate these secondary effects to some extent, thereby furthering the state's interest, cannot be thought unreasonable." *Id.* at 829. The court, in

footnote 10 (*id.*), found similar location restrictions "justified . . . to serve the legitimate interests in preserving residential neighborhoods and preventing urban decay," citing to court decisions, including *Young*, and the 1977 Study.

This Court in *Renton* recognized that the City of Renton could rely on the factual findings set forth by the Washington Supreme Court as support for its ordinance. 475 U.S. The factual findings contained in a decision of a district court have been held to be legally sufficient. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 830-831 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000). In addition to *Hart*, there is the substantial body of case law showing how individually and in combination, adult bookstores and arcades, are a constant source of negative secondary impacts which require a substantial allocation of governmental resources to ameliorate. *Arcara, supra*; *Ellwest Stereo Theatres, supra*; *E.W.A.P., Inc. v. City of Los Angeles, supra*. This long judicial history alone should be sufficient under *Renton* to support the conclusion that more than one adult business at a single site is not in the public interest because such a combination generates negative secondary effects leading to blight and decay. How much more compelling then is the substantial governmental interest when, as here, the City undertook to document the actual adverse secondary impacts of the concentration of adult businesses in small geographical areas within its boundaries.

In sum, the City reasonably and properly relied on *Hart* to support its already factual based legislative judgment. That judgment is supported by substantial evidence that all adult businesses must be disbursed in

order to control the negative secondary effects of such businesses. If there is a reasonable basis to conclude that adult businesses must be disbursed in order to effectuate the substantial governmental interest identified by the City (JA 49), then it must also be reasonable to conclude that two adult businesses at the same location is contrary to that same governmental interest.

C. The City's Prohibition Of More Than One Adult Business At A Single Location Meets All Of The Requirements Of *Renton*.

Even a cursory review of the City's zoning ordinance establishes that it easily survives First Amendment scrutiny based on the three *Renton* factors at issue here. Even though the court of appeals dismissed as "needlessly establishe(d)" *Renton's* first inquiry (App. 9), it reluctantly conceded that since the City's ordinance did "not ban adult entertainment establishments altogether" and that it is a time, place and manner regulation. App. 10. There is also no real dispute as to whether the City's ordinance is "content neutral."[16] The court of appeals stated that it "need not decide whether the contested regulation is content-neutral." App. 10. In any event, this Court has held that "with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of

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[16] As this Court said in another First Amendment context, "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." *Renton*, 475 U.S. at 49. The City's adult zoning regulations were enacted to "ameliorate the undesirable secondary effects of such businesses" (App. 60-61) and are, therefore, content-neutral regulations.

Moreover, this Court's decisions in *Young* and *Renton* establish that there is a substantial governmental interest in protecting the quality of urban life by minimizing the secondary effects of adult businesses. There is no dispute that the City's ordinance was designed to accomplish that goal. The zoning regulation at issue here is an integral part of a comprehensive zoning ordinance designed to do so by geographically separating adult businesses from each other as well as from historically protected sensitive land uses.

If adult businesses need to be separated from each other, they certainly cannot be located in the same building. The City does not ban adult arcades or adult bookstores. However, the City does not allow them to be located in the same place. The same is true for any and all combinations of adult businesses at one location, since the ordinance does not prohibit just an adult bookstore/video arcade combination, but all combinations of such businesses. The ordinance says that "[n]o person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof. . . . " App. 77.

The district court concluded that "[t]he 1977 Studies on which the City relies to prove a substantial government interest demonstrate the need for a distance

requirement for separate adult businesses." App. 47. That conclusion should have ended this inquiry in the lower courts, leaving open only the issue of whether the City's ordinance allowed for alternative avenues of communication.

D. There Is No Reason To Reformulate This Court's Test In *Renton* For Determining When Adult Businesses Result In Secondary Land Use Impacts.

In *Renton, supra,* this Court established four factors to consider in analyzing the constitutionality of zoning ordinances regulating adult entertainment businesses. First, if the ordinance does not ban adult businesses, it must be considered a "time, place and manner regulation." 475 U.S. at 46. Second, the court must determine whether the challenged regulation is "content neutral." *Id.* at 47. An ordinance is content neutral if it is "designed to combat the undesirable secondary effects" of adult businesses. *Id.* at 49. If so, it is "reviewed under the standards applicable to 'content-neutral' time, place and manner regulations." *Id.* Third, the government needs to show that the "ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Id.* at 50. The fourth *Renton* factor, whether the City's regulation provides for reasonable alternative avenues of communications (*id.*) is not before the Court.

Not content with this Court's straightforward *Renton* test, the court of appeals saw fit to reformulate "this test in a slightly different and (we believe) more coherent

manner."[17] App. 7. The court of appeals' reformulation of the *Renton* test fails to follow *stare decisis* and therefore, requires special justification, *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989), but does not provide any justification for doing so. Where, as here, "a precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997), citation and internal quotes omitted.[18]

This Court's *Renton* test is in no need of reformulation. It is a straightforward test which has been consistently applied without difficulty by other courts. See, e.g.,

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[17] In doing so, the court of appeals relies on *Colacurcio v. City of Kent, supra. Colacurcio*, however, contains no basis for concluding that the *Renton* test was somehow in need of any reformulation. The ordinance challenged in *Colacurcio* required a ten foot separation between a patron of an adult nightclub and the nude exotic dancer. 163 F.3d at 549. The First Amendment context was not zoning, as here, but expressive conduct and the *Colacurcio* court was primarily concerned with the level of constitutional protection to be given to nude table dancing in light of *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). *Id.* The *Colacurcio* court ultimately upheld the challenged ten foot separation requirement. *Id.* at 557. In doing so, the court cited to *Renton, Young* and other decisions of this Court to support its legal conclusions. Its analysis cannot be interpreted as establishing a new formulation of this Court's *Renton* test.

[18] This has also been the prevailing view of the Ninth Circuit. See, e.g., *Ackerley Communications of the Northwest, Inc. v. Krochalis*, 108 F.3d 1095, 1096 (9th Cir. 1997) ("However, it is not for us to overrule Supreme Court authority that is squarely on point.")

Mitchell v. Commission on Adult Entertainment Establishments, 10 F.3d 123 (3rd Cir. 1993); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994), *cert. denied*, 513 U.S. 1017 (1994); *Z.J. Gifts D-2, LLC v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998), *cert. denied*, 525 U.S. 868 (1998); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000);[19] as well as *Buzzetti v. City of New York*, 140 F.3d 134 (2nd Cir. 1998), *cert. denied*, 525 U.S. 924 (1998) and *City of National City v. Wiener*, 3 Cal.4th 852, 12 Cal.Rptr.2d 701, 838 P.2d 223 (1992), *cert. denied*, 510 U.S. 824 (1993).

CONCLUSION

The City zoning ordinance challenged here prohibits more than one adult business at the same location. In adopting this clarification of the City's general rule that adult businesses be separated from one another in order to avoid their proven secondary land use impacts, the City relied on its 1977 Study, a report this Court relied on to validate an adult business regulation of another city. In addition, the specific regulation challenged here was upheld by the Fourth Circuit in *Hart, supra*. The evidence relied on by the City meets the *Renton* standard of proof for zoning ordinances regulating adult businesses. Because the court of appeals did not properly apply that standard of proof and did not give proper deference to the City's legislative judgment as required by this Court's

[19] These first four cases are discussed in the City's Petition, pages 12-18.

precedent, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 17 2001
CLERK

No. 00-799

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

RESPONDENTS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Is Los Angeles' prohibition of "multiple use" adult businesses facially unconstitutional to the extent it prohibits traditional adult bookstores from having within them any video viewing machines in which one may view any of the videos for sale or rent in such stores?

CORPORATE DISCLOSURE STATEMENT

Respondents Alameda Books, Inc. and Highland Books, Inc. are California corporations, and have no parent or publicly held company owning 10% or more of their stock.

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STATEMENT OF THE CASE

Petitioner City of Los Angeles has divided its Statement of the Case into three discrete components. Part A discusses the legislative record, Part B discusses the facts pertaining to respondents (hereinafter simply "Alameda"), and Part C describes the procedural history of the case.

A. Legislative History.

Much of the City's description of the legislative record is either inaccurate or incomplete. The City's 1977 Study ("the Study") did *not* demonstrate any negative impact of adult businesses on property values but, on the contrary, fairly tended to prove that there was *no* such impact.[1]

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[1] The Legislative Record does summarize subjective "opinions" of realtors that clustering of numerous adult businesses in an area may tend to lower property values. However, the objective evidence refuted these opinions. Basically, the City established five geographical parts of the city for the self-described "empirical" portion of its Study (*see* JA 76), each including an area with a concentration of separate adult businesses, and each also including a comparable "control" area with no adult businesses. JA 79-80. The Study found that property values in *all five* "adult" areas *increased*. JA 86. Moreover, the Study found that in two of the five areas, the amount of the increase was actually *greater* in the "adult" portions than the portions containing the corresponding control. JA 44-45. As a result, the Study itself states:

> "On the basis of the foregoing it cannot be concluded that adult entertainment businesses have *directly* influenced changes in the assessed value of commercial and residential properties in the areas analyzed." JA 45.

Far more significant is what the Study did *not* examine. Most importantly, the Study made no attempt to determine whether a combination of two adult "uses" within a *single* business caused greater secondary effects than the "sum" of the secondary effects if such "uses" had operated in two separate locations.[2]

Neither did the Study demonstrate, nor even examine, whether *individual* adult businesses cause an increase in crime.[3] Significantly, the Study did not identify the

[2] For convenience, the term "uses" shall be used throughout to describe each of the different types of business activities which, if present, would cause the City to characterize such activity as a separate adult business use, even if such use does not in fact exist as a separate use anywhere but in the City's imagination. The uncontroverted evidence of record demonstrated that the "use" described as an "adult arcade" does not in fact exist anywhere in Los Angeles as a "stand alone" use independent of some other primary use such as a bookstore selling adult materials. *See, e.g.*, JA 229-230. Moreover, in discovery, the City was asked to identify all free-standing adult arcade uses in the City of which it was aware; it identified none.

[3] On the contrary, the Study includes comments by the City's Planning Department stating:

> "Several respondents commented that the adverse effects are related to the *degree* of concentration **and that one free-standing business may have no effect.**" JA 109. (Emphasis added).

Also, and as noted by the District Court in n.6 of its opinion (Pet. App. 39), it is clear from the face of the Planning Department's study that it did *not* consider any secondary effects attributable to a single adult business. As the District Court noted, two of the five control areas used by the Planning Department in fact *contained* single adult businesses. JA 81.

existence of any stand-alone adult arcade uses.[4] Also, there was absolutely *no* evidence in the legislative record of any secondary effects occurring *within* a combined adult bookstore/video arcade, nor *within* any other type of adult business studied. Specifically, the 1977 Study evaluated whether the clustering of multiple unrelated adult businesses in one part of Los Angeles (i.e., Hollywood) generally increased crime in the overall Hollywood area.[5] It made no attempt to determine the extent of, or even the existence of, any secondary effects occurring *within* (or on the property of) any adult entertainment businesses.

B. Facts of This Case.

Alameda adopts Part B of the City's Statement of the Case except to the extent specifically noted below:

1. Both Highland Books and Alameda Books are relatively small retail stores. The area open to the general

[4] As noted by the Court of Appeals, the City's 1977 Study "treated a bookstore/arcade combination as a single business or unit of adult entertainment whose secondary effects arise from its proximity to several other units of adult entertainment." Pet. App. 12.

[5] The scope of crimes studied makes clear that the City was not studying whether crimes occurred *within* adult businesses. For example, the record shows that the crimes studied included, e.g., homicide, rape, aggravated assault, robbery, burglary, larceny, auto theft, street robberies, purse snatches, forgery, counterfeiting, embezzlement and fraud, in addition to those noted in the City's Brief. JA 126. They also even apparently included suicide. JA 116. *None* of these crimes was shown or even alleged to have occurred on the premises of any adult businesses.

public in the two businesses is approximately 2,500 and 3,000 square feet, respectively. JA 224-225.

2. Both Alameda Books and Highland Books sell and rent sexually oriented products, including videotapes, and both stores provide video viewing booths in which, for a small fee, customers can view or preview the many thousands of different videotapes that are available for sale and/or rental in the store. JA 225.

3. The method of operation of the two stores is virtually identical. During most of the hours of operation, a single employee works at the store, a counter clerk who "rings up" retail sales and rentals and takes money for and supervises operation of the store's video viewing booths. That employee also checks identification to ensure that no minors enter the premises. *Id.*

4. The video viewing booths and retail sales areas of each store are located in a single commercial space within a single building. *Id.*

5. Each store has only one public entrance, the only access from the outside to either the video booths or the retail sales areas of the store. Customers may freely walk about the premises, entering and exiting the video viewing booths and browsing through the store. JA 225-226.

6. Both Highland Books, Inc. and Alameda Books, Inc., are the sole owners of the entirety of each respective business, including both the retail sales and video rental aspects of the stores and the on-premises video arcade portion of the store. JA 226.

7. Alameda Books has 15 video viewing booths. Highland Books has 19 video viewing booths. JA 227.

8. All of the videos exhibited in the viewing booths are available in the store for purchase or rental. JA 227.

9. Both Alameda Books and Highland Books carry approximately 6,500 different titles of sexually oriented

videotapes for rental or retail sale. Both stores allow customers to view or preview *any* of these thousands of video tapes in the store's video preview booths. A customer interested in a particular videotape may bring it directly to the counter clerk and request to preview it. After paying a small fee to the counter clerk, the customer is then directed to one of the video preview booths, and the clerk activates that videotape. After viewing the tape in the preview booth, the customer may purchase or rent it for subsequent home viewing. JA 228.

10. Previewing adult videotapes in the store where they are available for purchase or rental is the best source of consumer information regarding the content of such videos. JA 243.

11. At all relevant times, both Highland Books and Alameda Books have maintained a prominently displayed sign which, in pertinent part, states:

> "ALL VIDEOS IN THIS STORE ARE AVAILABLE FOR RENT, PREVIEW, AND/OR SALE." JA 228-229.

12. In both stores, customers regularly rent or purchase videotapes after having previewed those tapes in one of the video viewing booths. JA 229.

13. The uncontroverted record tended to show that no "adult arcade business" exists anywhere, independent of some other primary business, such as an adult bookstore. JA 229-230.[6]

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[6] The City is correct in noting that the record reflects that both Alameda Books and Highland Books initially operated as adult video arcade uses and not as "adult bookstores" (as that term was then understood by Alameda). This is not, however, an inconsistency. L.A.M.C. § 12.70B(2) has at all times defined an "adult bookstore" to include any business which carries

14. If the City is allowed to enforce its multiple-use restriction, it will eliminate all practical opportunities for members of the public to preview sexually oriented videotapes prior to making an on-site decision to purchase or rent such videotapes. JA 242-243.

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adult items as a "substantial portion of its stock-in-trade." However, until the California Supreme Court's decision in *People v. Superior Court (Lucero)*, 49 Cal.3d 14, 28, n.10, 259 Cal.Rptr. 740, 748, n.10, 774 P.2d 769 (1989), California's courts held that an "adult bookstore" definition like Los Angeles', using the "substantial-portion-of-the-stock-in-trade" language, must be interpreted by the "preponderance test," whereby a bookstore was considered "non-adult" even if as much as 49% of its inventory was adult. *See, e.g., Kuhns v. Santa Cruz County Board of Supervisors*, 128 Cal.App.3d 369, 181 Cal.Rptr. 1 (1982).

The record also reflects that throughout the initial period of operation of these two businesses, both in fact sold adult materials, though less than a *preponderance*. JA 19. Accordingly, this was entirely consistent with Mr. Wiener's statement (at JA 229-230) that in his 15 years of experience in the industry, he has "never heard of a business which maintained or operated motion picture or video viewing booths as a primary use except in conjunction with retail sales of related media materials, such as adult books, magazines, films or video tapes."

Today such a method of operation would not allow such uses to escape characterization as a "multiple use" adult bookstore and "adult arcade." The record reflects that the City, but for judicial compulsion, would not gratuitously provide a "preponderance test" safe harbor. *See, e.g.* Respondents' Appendix (hereafter "RA") 4-5. Instead, even adult inventory of as little as 1-2% of the total inventory could provide the basis for a characterization that the use in question is an "adult bookstore" under LAMC § 12.70. *See* p. 63 of the Transcript of the Deposition of James Carney (the City's Chief Inspector for its building department) at RA 16, pp. 90-93 of the deposition transcript of City Building Inspector Roger Mepham (RA 11-12), and *see* ¶ 35 of the Garrou Declaration (RA 7).

15. After its 1983 enactment of the multi-use ban, the City added further limits on the permissible sites for adult businesses. Currently, L.A.M.C. § 12.70C prohibits adult businesses, including adult arcades, from operating within 500 feet of "a religious institution, school, or public park within the City of Los Angeles," within 1,000 feet of any other adult business, within 500 feet of "any lot in an 'A' [agricultural] or 'R' [residential] zone," or "within the 'CR', 'C1', or 'C1.5' [limited commercial] zones in the City of Los Angeles." RA 25. These limitations on "adult" businesses are superimposed on a general zoning scheme with which adult businesses must also comply.

16. Both of respondents' businesses are lawfully situated in appropriate commercial zones and comply with all of the locational restrictions of L.A.M.C § 12.70C other than the one challenged herein. Neither business is within 500 feet of any church, school, park or residential or agricultural zone, nor within 1,000 feet of any other adult entertainment business. JA 224.

C. The Proceedings Below.

Regarding the procedural history of the case, respondents add the following:

1. **The District Court's Ruling.** In its initial ruling *denying* summary judgment to Alameda, the District Court noted that there was "a genuine issue as to whether the [1983 multi-use] ordinance serves a substantial government interest under the secondary effects doctrine." JA 302. *See also* JA 292 and JA 305. However, in seeking reconsideration, Alameda argued that under *Celotex v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), whichever party has the burden of proof at trial on a particular issue also has the burden of

proof at the time of summary judgment. Alameda further argued that the burden of justifying the ordinance was on the City, and that if the City had not produced sufficient evidence to meet that burden by the time of summary judgment, it was not entitled to defer meeting its burden until trial. Agreeing, the District Court reversed itself and awarded summary judgment to Alameda. Pet. App. 28-30.

Moreover, in contrast to the "narrow tailoring" time, place and manner rationale utilized by the Court of Appeals, the District Court appears to have concluded, as a threshold matter, that the ordinance was not content-neutral.[7] It reached this conclusion because the only evidence submitted in the record on summary judgment by the City was its 1977 Study and related non-Study material, none of which, the District Court concluded, demonstrated a content-neutral justification for the 1983 ordinance. Pet. App. 51.[8]

2. **The Court of Appeals' Ruling.** In contrast to the District Court's rationale, the Court of Appeals expressly declined to analyze whether the ordinance was content-neutral (Pet. App. 10), as it concluded that in any event the ordinance could not withstand analysis under the less

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[7] Portions of the District Court's ruling appear to have been based on time, place and manner analysis, but it ultimately resolved the case based on the conclusion that the ordinance was content based and therefore subject to strict scrutiny. Pet. App. 51. *See also* Pet. App. 54-55.

[8] Moreover, none of the materials submitted by the City on summary judgment evidenced any City Council reliance on *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), the only published opinion prior to that in the present case to have addressed a similar type of ordinance scheme.

strenuous time, place and manner test.[9] Pet. App. 8 and 10. Specifically, the Court of Appeals found that the ordinance was not *narrowly tailored* to serve a substantial governmental interest because, even assuming, *arguendo*, the existence of any secondary effects caused by an adult bookstore containing video viewing booths, there was no evidence suggesting that the total amount of any such secondary effects would be diminished if such "businesses" were, instead, operating at two separate locations as two separate types of uses. Pet. App. 20-21:

> "Prohibiting arcades and adult bookstores from being located in the same building would not prevent the type of unhealthy conditions in the booth that the Fourth Circuit [in *Hart*] cited as the only evidence produced by North Carolina to justify its statute. There is nothing in the case to indicate that the same type of behavior that occurs in viewing booths in combination bookstore/arcades would not occur in an establishment that only furnishes an arcade. Therefore, any inference that the statute could have an ameliorating impact on the identified harmful secondary effects would be unreasonable." *Id.*

SUMMARY OF ARGUMENT

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court stated that adult zoning restrictions should be "analyzed as a form of time, place, and manner regulation" (*id.* at 46), and that a city must rely upon

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[9] In so ruling, the Court of Appeals stated that it was expressing no disapproval of the alternative basis upon which the district court had premised its ruling, calling it a "perfectly reasonable" approach. *Id.*

"evidence" which "is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51. This Court also made clear that the justifications for the ordinance must have been presented "in enacting" the challenged ordinance. *Id.*

The City and its amici have significantly misread *Renton* as eliminating any requirement of actual reliance on content-neutral secondary effects by the enacting body. Instead, they essentially argue that this particular time, place and manner restriction need be subjected only to rational basis review, and may be supported solely by unchallengeable *post-hoc* justifications never considered by the enacting body.

Under the City's syllogism, all adult businesses (no matter how defined) are presumed to have "secondary effects," and such secondary effects automatically justify any restrictions on such businesses short of a total ban, regardless of whether there is a reasonable fit between the particular secondary effects offered as justification and the scope of the challenged restrictions. In essence, the City asks this Court to jettison a modest, effective requirement it has imposed in *all* other intermediate scrutiny cases, e.g., that government must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. *See Turner Broadcasting System v. F.C.C. (Turner I)*, 512 U.S. 622, 664 (1994), and *Turner Broadcasting System v. F.C.C. (Turner II)*, 520 U.S. 180, 195 (1997).

Moreover, this Court's decisions repeatedly warn against the danger of pretextual laws masquerading as content-neutral regulations and the need for safeguards

to prevent such abuses. Given that legislation may apparently no longer be challenged on the ground of improper legislative motive, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 292 (2000), the only remaining safeguard against unbridled censorship masquerading under the pretext of content-neutral regulation is intermediate scrutiny's objective requirement that in enacting legislation, the governmental body must have had a reasonable content-neutral basis before it. While urging the removal of any such objective requirement, the City offers no alternative remedy to protect against the rampant pretextual abuses that its proposed solution would so clearly invite.

The Ninth Circuit correctly concluded that the City failed to establish that it had a reasonable basis for concluding that the ordinance would reduce any secondary effects. The court correctly noted that the City's 1977 Study (the sole secondary effects study actually before the City Council) examined only secondary effects caused by a *clustering* of *unrelated* adult businesses, but did not examine whether a ban on so-called multiple adult uses within a single business would ameliorate the types of secondary effects identified in the Study.

In short, the Ninth Circuit based its ruling on the fact that the City established absolutely no reasonable basis for concluding that the secondary effects of a traditional combined adult bookstore/arcade would be greater than any secondary effects which would be generated by an arcade standing alone. Neither did the legislative record suggest that any secondary effects from a traditional combined adult bookstore/arcade would be greater than the *sum* of any secondary effects which would be generated if the existing business split into two separately-located

businesses. Indeed, logically, it seems that there would be *greater* secondary effects in the latter circumstance.

Unlike the Court of Appeals, which analyzed the ordinance as a time, place and manner restriction, the District Court first addressed the question of whether it was content-neutral. The District Court correctly concluded that the City had not established any evidence, either in its legislative record or by the time of summary judgment, to demonstrate a reasonable basis for the challenged ordinance.

The ordinance is also invalid, however, for at least two additional reasons which were raised in, but not addressed by, both courts below. First, the ordinance effectively prohibits consumers from previewing videotapes they are considering purchasing or renting, even though the record shows that consumers have no other adequate avenue for obtaining truthful information about the contents of individual videotapes, to assist them in deciding which ones to purchase or rent for home viewing. The ordinance constitutes a total ban on the operation of preview booths and fails to provide an adequate or ample alternative channel by which customers can obtain comparable information.

Second, the ordinance unconstitutionally mandates the parsing of Alameda's expressive business into more narrowly defined types of businesses where fewer types of expression may be offered, i.e., an "adult arcade" and an "adult bookstore." The uncontroverted record shows that *no* "adult arcades" – other than those operating within stores selling adult oriented materials – have ever existed in Los Angeles or anywhere else. Consequently, the ordinance requires this medium to convert to an untested format – one which the City failed to show will

reasonably permit it to survive. Because the City failed to demonstrate that the ordinance leaves open ample alternative public access to adult arcades, it is subject to strict judicial scrutiny, which it cannot meet.

Alternatively, however, even if this Court concludes that the City met its burden to demonstrate that the ordinance is not a *de facto* ban on adult arcades, this requirement would fail in any event under a test of intermediate scrutiny, because it burdens substantially more expression than is necessary for the amelioration of any secondary effects offered in justification of the ordinance.

ARGUMENT

I

RESPONDENTS URGE THIS COURT TO REJECT THE CITY'S SUGGESTION TO CONFER ABSOLUTE TALISMANIC IMMUNITY ON ALL ADULT BUSINESS REGULATIONS

Not content with a standard of judicial review which is already exceedingly deferential, the City and its amici have now gone to the ultimate step of essentially asking this Court to abandon and foreclose *all* judicial inquiry into the validity of every conceivable adult entertainment regulation, so long as the City simply recites the mantra of "secondary effects." The City's argument is essentially this: "all adult businesses have secondary effects; cities are entitled to 'a reasonable opportunity to experiment with solutions to admittedly serious problems,' and, accordingly, it is improper for any court to meddle into the province of the legislative branch when cities enact

restrictions of adult entertainment businesses." Its argument continues: "*Any* secondary effects justify *any* restrictions on adult businesses, and a city need not establish a reasonable fit between the observed secondary effects and the nature and scope of the regulation." For a host of reasons, this Court is urged to resist the concerted efforts by the City and its amici to insulate their actions from any meaningful First Amendment scrutiny whatsoever.

Perhaps the most important reason why the suggested abandonment of judicial scrutiny should be rejected is that its adoption would unquestionably open the floodgates to pretextual laws masquerading as content-neutral regulations but which, in fact, are designed simply to eliminate, or severely burden, a type of expression found objectionable by government officials.

In *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), this Court held that the First Amendment did not preclude the closing of an adult bookstore under generally-applicable anti-prostitution laws. However, concurring in the judgment, Justice O'Connor warned of the need for judicial scrutiny to insure that the targets of such nuisance abatement actions were not singled out because of the nature of the books they sold "or because of the perceived secondary effects of having a purveyor of such books in the neighborhood." 478 U.S. at 708. Justice O'Connor stated that if a city were to use a nuisance statute as a "pretext" for achieving such alternative purposes, "the case would clearly implicate First Amendment concerns and require [First Amendment] analysis."[10] *Id.*

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[10] To the same effect were Justice Powell's remarks in providing the critical fifth vote needed in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), this Court's first adult zoning case:

> "[C]ourts must be alert to the possibility of [a] direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a *pretext* for suppressing expression." *Id.* at 84 (emphasis added).

However, if this Court were to adopt the further relaxation of judicial scrutiny the City seeks, there will simply no longer *be* any mechanism for demonstrating such pretextual abuses. Given that the subjective motivations of an enacting body may apparently no longer be used to demonstrate that a challenged law is content-based, *see, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277, 292 (2000), the *only* way of demonstrating whether a legislature's purposes were truly content-neutral or, alternatively, pretextual, is to determine whether the legislative body *in fact* had before it at the time of enactment an adequate content-neutral evidentiary basis to support a *reasonable* belief that the challenged law would ameliorate clearly established secondary effects.[11] Such a

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[11] Of course, as *Renton* instructs, the evidence need not be created, in the first instance, by the city whose enactment is challenged. If that city council in fact relied on evidence provided from some other source, it may elect to adopt and use that evidence. (Here though, there is no evidence that the Los Angeles City Council in 1983 relied on an adequate evidentiary basis from any other city or from any court opinions.) Nor is it required that a legislative body "make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner Broadcasting System v. F.C.C. (Turner I)*, 512 U.S. 622, 666 (1994). However, there must at least be *some* minimally adequate quantum of evidence in the legislative record to show that enactment of the law was not pretextual but, instead, was a *reasonable* legislative response to a real problem.

requirement brings the only element of objective scrutiny to the analysis and constitutes the only remaining bulwark against pretextual abuses.

Indeed, this Court has imposed this requirement (that an enacting body had before it an objective basis for legislation) in a variety of contexts where legislative motivation was suspect under a test of intermediate scrutiny. *See, e.g., Turner Broadcasting System v. F.C.C. (Turner II)*, 520 U.S. 180, 211 (1997),[12] and *United States v. Virginia*, 518 U.S. 515, 533 (1996).

More recently, Justice O'Connor again warned of the danger of pretextual abuses – albeit in a Fourth Amendment context – in *Atwater v. City of Lago Vista*, ___ U.S. ___, 121 S.Ct. 1536 (2001), where this Court upheld the authority of peace officers to make warrantless arrests for misdemeanors as minor as seatbelt violations. Justice O'Connor's dissent for four members of the Court was based simply on the fact that giving officers such unbridled discretion to arrest leaves the victim of an unreasonable search with no effective method by which to prevent pretextual arrests:

> "[U]nbounded discretion carries with it grave potential for abuse. . . . [A] relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, . . . [a]n officer's subjective motivations

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[12] "The question is not whether Congress, as an objective matter, was correct to determine must-carry is necessary to prevent a substantial number of broadcast stations from losing cable carriage and suffering significant financial hardship. Rather, the question is whether the legislative conclusion was reasonable *and supported by substantial evidence in the record before Congress.*" *Id.* (Emphasis added.)

> for making a traffic stop are not relevant considerations in determining the reasonableness of the stop." ___ U.S. at ___, 121 S.Ct. at 1567.

The First Amendment analogy is even more compelling. This Court's jurisprudence is filled with examples of governmental attempts to suppress controversial expression under the pretextual guise of enforcing content-neutral restrictions. *See, e.g., Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *NAACP v. Alabama*, 377 U.S. 288 (1964); *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

Under the standard the City urges, there will be no protection against governmental abuse, and the First Amendment protections so carefully crafted by this Court over decades of jurisprudence will literally vanish.[13] In

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[13] This Court's decisions have repeatedly clarified that regulations of non-obscene sexually-oriented expression, not involving either child pornography or speech mixed with conduct, are subject to full First Amendment protection. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), where a majority of the Court rejected the plurality's assertion that non-obscene sexually-oriented expression is entitled to less than full First Amendment protection (*see* concurring opinion of J. Powell for majority of the Court, 427 U.S. at 73, n.1); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72-73 (1994); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 67 (1989); *Smith v. California*, 361 U.S. 147, 152 (1959). Indeed, many of this Court's most significant tests for First Amendment protection were crafted out of the crucible of litigation involving adult entertainment businesses. *See, e.g., Freedman v. Maryland*, 380 U.S. 51 (1965) (any legislative scheme for licensing expressive activity must conform to strict

Roth v. United States, 354 U.S. 476 (1957), this Court allowed governmental prohibition of materials found to be legally "obscene" but warned that

> "[c]easeless vigilance is the watchword to prevent . . . erosion [of 'the fundamental freedoms of speech and press'] by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." 354 U.S. at 488.

The *de facto* abandonment of judicial review of adult business regulations advocated by the City would constitute the utter and final rejection of these critical cautionary words uttered in *Roth*. If the City need not demonstrate even a "reasonable fit" between a challenged ordinance and the amelioration of the secondary effects which assertedly justify that ordinance, then talismanically-proclaimed "content-neutral" (though in fact pretextual) restrictions will ensure the elimination of any and all targeted adult entertainment businesses.[14]

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procedural safeguards to protect against censorship by delay); *Smith v. California*, 361 U.S. 147 (1959) (First Amendment forbids booksellers from being held strictly liable for the media materials they sell).

[14] In *Turner Broadcasting System v. F.C.C. (Turner I)*, 512 U.S. 622 (1994), a majority of this Court concluded that a First Amendment test of "intermediate scrutiny" should apply and a plurality consisting of Justices Kennedy, Rehnquist, Blackmun and Souter stated that the appropriate test, in such a case, is that the government "must *demonstrate* that the *recited* harms are *real*, not merely *conjectural*, and that the regulation will *in fact alleviate* these harms in a direct and material way." 512 U.S. at 664 (emphases added). In *Turner II*, a full *majority* of this Court adopted and applied the plurality's articulation of this intermediate scrutiny standard of review. See 520 U.S. at 195.

The abandonment of any meaningful judicial scrutiny, as advocated by the City, is also inconsistent with this Court's decision in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), where this Court squarely rejected virtually the same argument the City and its amici reassert here:

> "The City claims that no . . . trial of the issues is required, because the City need not 'generate a legislative record' in enacting ordinances which would grant one franchise for each area of the City." 476 U.S. at 495.
>
> "The flaw in the City's argument is that [the cases upon which the City relies] involved Fifth Amendment equal protection challenges to legislation, rather than challenges under the First Amendment. Where a law is subjected to a colorable First Amendment challenge, *the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force.* [Citation omitted.] This Court 'may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity.' " 476 U.S. at 496 (emphasis added).

Likewise here, and unlike in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), where there was speech mixed with conduct, the only businesses before the Court are those engaged in pure expression (e.g. books, magazines, videotapes, etc.), not conduct. In such a case, this Court has advised the lower courts that they "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity." *Preferred Communications*,

476 U.S. at 496.[15] The Court of Appeals below merely applied this Court's dictates, and properly refused to simply *assume* that the ordinance necessarily advanced the asserted municipal interests.

II

APPLYING TRADITIONAL TIME, PLACE AND MANNER ANALYSIS, THE NINTH CIRCUIT PROPERLY FOUND THAT THE ORDINANCE WAS NOT NARROWLY TAILORED TO FURTHER A SIGNIFICANT GOVERNMENTAL PURPOSE BECAUSE THERE WAS NO REASONABLE BASIS FOR CONCLUDING THAT A COMBINATION ADULT BOOKSTORE/ARCADE WOULD HAVE GREATER SECONDARY EFFECTS THAN THE SUM OF THE SECONDARY EFFECTS IF SUCH USES OPERATED SEPARATELY

The Court of Appeals determined that the City failed to establish a reasonable basis for concluding that its ordinance was narrowly tailored to serve a significant and legitimate governmental purpose.

The primary defect the Court of Appeals found in the City's ordinance appears in the portion of its opinion rejecting the City's attempted reliance on *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979). Pet. App.

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[15] As Justice Thomas recently noted in his concurring opinion in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 830-31 (2000):

> " 'Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.' " (Quoting from Justice Souter's concurring opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996).)

20-21. Even though *Hart* is not referenced anywhere in the legislative record (and therefore must be considered as being offered entirely *post-hoc* solely for litigation purposes), the Court of Appeals nonetheless examined the justifications advanced in *Hart* to determine whether they could sustain the Los Angeles ordinance.[16] However, it found that the only evidence in *Hart* was that *arcade booths* of the type there at issue were often the site of adverse secondary effects.[17] The North Carolina report referenced in *Hart* did not provide any evidence suggesting that these problems would likely decrease if the video arcades operated as free-standing facilities. The Court of Appeals below logically assessed the significance of this fact:

> "There is nothing in [*Hart*] to indicate that the same type of behavior that occurs in viewing booths in combination bookstore/arcades would not occur in an establishment that only

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[16] Consideration of *post-hoc* materials in a time, place and manner analysis is, of course appropriate, after the basic issue of content-neutrality has been established by justifications actually appearing at the time of enactment. *See, e.g., Turner I* (finding sufficient evidence in the legislative record to conclude statute was content-neutral, and then remanding for further *post-hoc* evidence to show that statute was narrowly tailored to further a substantial purpose).

[17] It is also relevant that the types of arcades analyzed by *Hart* in North Carolina in 1979 were not shown to be the same as those in Los Angeles. Pursuant to L.A.M.C. § 103.101 (enacted in November of 1977), video booths in Los Angeles may not have doors on them, must have minimum levels of illumination, and their interiors must be visible from the entrance to the premises. *See* RA 37. (By comparison, Los Angeles completed its 1977 Study in June of that year, before enactment of any of these ameliorative provisions. *See* JA 35.)

> furnishes an arcade. Therefore, any inference that the statute could have an ameliorating impact on the identified harmful secondary effects would be unreasonable." Pet. App. 20-21.

Although the Court of Appeals was undoubtedly correct in this analysis, the case against reliance on *Hart* is even *stronger* than articulated by the Ninth Circuit.[18] As noted by the Court of Appeals above, *Hart* provided no evidence that there would be *greater* secondary effects from a *combined* bookstore/arcade than an arcade operating alone. It follows, a fortiori, that *Hart* provided no evidence to suggest that the secondary effects from an existing combination bookstore/arcade would be greater than the *sum* of any secondary effects generated if the combined two uses were re-established in two separate locations. Nothing in logic suggests that this would be the case. Indeed, it is probably the case that separating such businesses into two distinct locations would actually *increase* the total of any secondary effects because of the problems caused by the proliferation of numerous new separately located adult entertainment businesses.[19]

Therefore, the Court of Appeals was clearly correct in concluding that there was simply not a reasonable basis

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[18] A city may, of course, adopt *evidence* found in published judicial decisions. However, *stare decisis* aside, a judicial approval of legislation on the basis of that evidence does not preclude other courts in other cases from finding that evidence inadequate to justify other legislation.

[19] Given that the record reflects that every video arcade in Los Angeles operates in some type of adult bookstore, implementation of the ordinance would require the City to absorb large numbers of new, separately located adult businesses. It is not intuitively obvious that this would be in the best interests of anyone.

for a conclusion that the challenged ordinance was narrowly tailored to "in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664.

The second basis for the Court of Appeals' ruling was its conclusion that the City's 1977 Study was designed solely to examine the effects of the *clustering* of separate adult entertainment businesses and not to examine or evaluate whether the secondary effects observed there might also have been generated by a single business consisting of a traditional adult bookstore with video viewing booths. As noted in the Statement of the Case, the legislative record is absolutely clear that the 1977 Study made no attempt to analyze this issue.

Accordingly, for both of the reasons above, the Court of Appeals properly found that the challenged ordinance was not narrowly tailored to further a significant governmental purpose, because there was no reasonable basis for concluding that "the recited harms are real . . . and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664. In short, no "reasonable fit" was shown.

The City's criticisms of the Court of Appeals ignore the two fundamental points noted above. Instead, the City *mischaracterizes* the standard adopted by the Court of Appeals in hopes that this Court, in knocking down this straw man, will remove all vestiges of judicial review in this area.

Specifically, at p. 14 of its Brief, the City states that the Ninth Circuit "stumbled over" the proper application of the time, place and manner test by requiring the City to "prove" that a combination of adult uses within one business contributes to the harmful secondary effects identified in the City's 1977 Study. This statement is inaccurate. The Ninth Circuit did not require the City to *prove* that a

combination of adult uses in a single business causes greater secondary effects than if each of the component businesses were to operate at separate locations. Rather, following *Renton*, the Ninth Circuit required the City to demonstrate only that it had a "reasonable basis" for believing that to be the case. The Court of Appeals faulted the City for failing to even establish a "reasonable basis" for that legislation, not for failing to "prove" anything.

For example, in *Young*, the City of Detroit did not definitively *prove* that clustering of adult businesses caused the noted secondary effects. It simply established enough evidence of a correlation that one could "reasonably believe" that the harms recited were real and caused by the clustering of the adult businesses. As a matter of constitutional law, if a city introduces sufficient evidence to establish a "reasonable belief" that the harms recited are real and that the enacted ordinance will remedy those harms, then it creates a rebuttable presumption of validity. In this case, the Court need go no further to resolve this matter, because the City never met this threshold test.[20]

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[20] However, in other cases not presently before this Court, a further corollary is necessary. A city's showing of a "reasonable basis" should establish a *rebuttable* – not an *irrebuttable* – presumption of validity, subject to the challenger's having the opportunity to provide evidence definitively showing that the city's beliefs, though reasonable, are in fact incorrect. *See, e.g., Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001). *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000), faulting a nude dancing establishment for failing "to contest the council's findings about secondary effects." Presumably this criticism means that the Court intends that the presumption of validity which arises when a city demonstrates a "reasonable basis" may then be overcome if the challenger adequately "cast[s] . . . specific doubt on the validity of those findings." *Id.*

III

THE DISTRICT COURT PROPERLY CONCLUDED THAT THE CITY HAD NOT ESTABLISHED A CONTENT-NEUTRAL JUSTIFICATION IN THE LEGISLATIVE RECORD, AND PROPERLY APPLIED *CELOTEX v. CATRETT* IN GRANTING SUMMARY JUDGMENT, THEREBY PRECLUDING THE CITY FROM OFFERING ANY *POST-HOC* OR OTHER JUSTIFICATIONS NOT OFFERED BY THE TIME OF THE SUMMARY JUDGMENT RULING

The District Court analyzed the challenged ordinance slightly differently than the Court of Appeals, though arriving at the same ultimate conclusion. The District Court concluded that the ordinance was content-based, thereby pretermitting the need to analyze whether the ordinance met the applicable tests for time, place and manner restrictions. This Court's decisions make clear that it was certainly not improper for the District Court to adopt this approach,[21] and in fact it may be the preferred manner of proceeding.[22]

The District Court concluded that, under applicable precedent, content neutrality must be determined based

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[21] See the numerous cases Justice O'Connor cited in her concurrence in *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994).

[22] In *Ladue*, this Court invalidated the city's residential sign ordinance after applying a time, place and manner test, but before addressing the question of whether it was content-neutral. In her concurring opinion, Justice O'Connor noted the unusual order in which the Court had approached its analysis:

> "The normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny." 512 U.S. at 59.

upon the legislative record and cannot be demonstrated by *post-hoc* justifications. (*See, e.g.*, JA 33-34.) This was entirely consistent with both the facts and holding in *Renton* and with the reality that there is simply no other workable and objective way to expose those ordinances which are merely pretextual.

In *Renton*, this Court stated the applicable test as follows:

> "The First Amendment does not require a city, *before enacting such an ordinance*, to conduct new studies or produce evidence independent of that already generated by other cities, *so long as whatever evidence the city relies upon* is reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52. (Emphasis added.)

The City reads the above quoted language from *Renton* out of context, concluding that the phrase "whatever evidence the city relies upon" refers to *post-hoc* justifications offered for the first time in litigation, even if those justifications were never presented to the enacting city council. This interpretation grossly misreads *Renton*.

First, the evidence which this Court found to justify Renton's "reasonable reliance," was the evidence in the Washington Supreme Court's opinion in *Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978), which this Court specifically found "was before the Renton City Council when it enacted the ordinance in question here." 475 U.S. at 50-51.

Second, earlier in the same paragraph quoted above, this Court specifically articulated that the reliance it was discussing was that which occurred "in enacting" the challenged ordinance. 475 U.S. at 51. Specifically, this Court stated:

> "We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and . . . on the 'detailed findings' summarized in the . . . *Northend Cinema* opinion, ***in enacting*** its adult theater zoning ordinance." *Id.* (emphasis added).

In the language quoted immediately above, this Court precisely articulated the point in time to which this reliance on other studies should refer, and it stated that the reliance should occur "in enacting" the ordinance, not at some later point in time when conjuring up *post-hoc* justifications for a reviewing court.

Accordingly, a reasonable reading of *Renton* suggests that the justification for the ordinance must have been before the legislative body at the time of the enactment and cannot be added later as a *post-hoc* justification by creative lawyers. If the primary purpose of the "reasonable basis" test is to provide an objective mechanism (indeed the *only* mechanism) for detecting and preventing pretextual content-based legislation, then this is the *only* fair reading of *Renton*.

Subsequent to *Renton*, this Court further clarified its position on this issue in two significant cases: *Turner Broadcasting System v. F.C.C. (Turner II)*, 520 U.S. 180 (1997), and *United States v. Virginia*, 518 U.S. 515, 533 (1996), both of which involved judicial review of legislation under a test of intermediate scrutiny.[23]

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[23] In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), this Court noted that the *O'Brien* test "in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions." *Id.* at 798. In *Turner II*, this Court held that a test of "intermediate First Amendment scrutiny" applies to all content-neutral restrictions of speech under the *O'Brien* test. 520 U.S. at 185. Consequently, to the extent the time, place and

In *Turner II*, this Court applied "intermediate First Amendment scrutiny under *United States v. O'Brien*" in analyzing the asserted content-neutral justifications the Government offered in support of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act. 520 U.S. at 185. The parties challenging that law had asserted that "the must-carry law is not necessary to assure the economic viability of the broadcast system as a whole." 520 U.S. at 211. This Court rejected that contention, stating that it was irrelevant whether Congress was in fact *correct* in determining the necessity for the Act, so long as it *in fact* considered substantial evidence from which it could reasonably conclude the need for the Act:

> "This assertion misapprehends the relevant inquiry. The question is not whether Congress, as an objective matter, was correct to determine must-carry is necessary. . . . Rather, the question is whether the legislative conclusion was [1] reasonable and [2] supported by *substantial evidence in the record before Congress.*" 520 U.S. at 211 (emphasis added.)

While *Turner II* reaffirmed that "deference must be accorded to [legislative] findings," 520 U.S. at 196, it nonetheless reiterated that a minimum threshold amount of evidence must appear in the record to support a "reasonable basis" for the legislation:

> "Our sole obligation is 'to assure that, in formulating its judgments, Congress has drawn

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manner and *O'Brien* tests involve common elements (e.g., narrow tailoring and proof of a substantial governmental purpose), they are presumably analyzed under the same test of intermediate First Amendment scrutiny.

> reasonable inferences *based on substantial evidence.*' " *Id.* at 195, quoting from *Turner Broadcasting System v. F.C.C. (Turner I)*, 512 U.S. 622 (1994). (Emphasis added.)

While both *Turner I* and *Turner II* clarified that *post-hoc* evidence is permissible for determining (in the context of a time, place and manner analysis) whether a content-neutral law is narrowly tailored to serve a substantial governmental purpose, the cases stand for the proposition that before one even examines a law for narrow tailoring or a substantial purpose, the *initial* determination of whether the law is in fact *content-neutral* must be established by virtue of evidence *in fact* considered by the enacting body.

In *United States v. Virginia*, 518 U.S. 515 (1996), another case involving an intermediate level of scrutiny, this Court, in the context of an asserted gender-based equal protection violation, reiterated even more forcefully the inappropriateness of allowing *post-hoc* justifications as the *sole* basis of support for allegedly unconstitutional action:[24]

> "The justification must be genuine, not hypothesized or invented *post-hoc* in response to litigation." *Id.* at 533.

While *United States v. Virginia* arose in an equal protection context, the reasons for its rule are no less applicable here. Specifically, this Court was sensitive to the fact

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[24] Although the Court's opinion does not use the express term "intermediate scrutiny," it is clear that the standard of review was intermediate scrutiny in that it was less demanding than strict scrutiny but more rigorous than rational basis scrutiny.

that there was a significant danger of pretextual discrimination against a particular category of persons. It recognized that where there is a significant likelihood of pretextual legislation, it is critical to have an objective test rather than one which allows justifications to be presented *post-hoc*. That is certainly no less true in the area of adult entertainment regulations, where, as noted above, this Court has repeatedly warned of the danger of pretextual regulations. *See, e.g.*, Powell, J., in *Young*, 427 U.S. at 84, and O'Connor, J., in *Arcara*, 478 U.S. at 708.

Finally, as noted above, this Court's decision in *City of Los Angeles v. Preferred Communications, Inc.* also expressly *rejected* the suggestion that "the City need not 'generate a legislative record' in enacting ordinances" challenged under the First Amendment. 476 U.S. at 495.

Given the unequivocal precedent above, the District Court did not err in limiting its review to the materials and arguments which were in fact before the City Council at the time of enactment of the challenged ordinance.

Moreover, because the legislative record did not even *purport* to rely on the *studies* of any other cities,[25] nor any

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[25] It *is* clear that the City's 1977 Study *did* look at the *ordinances* enacted by a number of other cities. *See, e.g.*, JA 61-64. However, it does *not* appear that the City examined any secondary effects *studies* related to any of these ordinances. The only oblique reference to any secondary effects from other cities appears to pertain exclusively to Boston and Detroit. With respect to Boston, the 1977 Study noted that the concentration-style adult ordinance enacted there produced an undesirable "combat zone" and, for this reason, was not followed by the City of Los Angeles. JA 42 and 55-57.

While the Study also references the Detroit approach (JA 57), it does not come close to articulating or describing any

studies described in any other judicial opinions,[26] the District Court was correct in concluding that the content-neutrality of the ordinance must stand or fall on the basis of the City's 1977 Study. However, as noted above, nothing in that Study demonstrated a reasonable basis for believing that separating traditional adult bookstores into a separate adult arcade use and a separate adult bookstore use would in fact ameliorate the net total of any perceived secondary effects emanating from such new businesses. Accordingly, the District Court was correct in holding that the ordinance was content-based and that there was no objective evidence of a content-neutral purpose in the record.

Alternatively, the District Court's conclusion would be no less correct even if this Court were to conclude that content-neutrality may be demonstrated solely by *post-hoc* justifications. Under *Celotex v. Catrett*, 477 U.S. 317

Detroit studies which would provide justification for the current multiple-use prohibition. Instead, it simply reports that the Detroit approach has apparently been "an effective tool" because, "[t]o date, 18 adult bookstores and six adult theatres have been closed." JA 57.

Moreover, while the Study makes a brief reference to this Court's decision in *Young*, it does not describe the study reported in *Young*, much less rely on that study. Los Angeles, instead, chose to do its own secondary effects study and placed its reliance solely on that study. (As a practical matter though, the Detroit study was similar to the Los Angeles Study in that neither demonstrated that the sum of the secondary effects emanating from two separate adult businesses such as an adult bookstore and adult arcade would be less than the secondary effects emanating from a single combined adult bookstore/arcade.)

[26] The legislative record is devoid of any reference to – or reliance upon – *Hart v. Edmisten, supra*.

(1986), the City is certainly limited to whatever arguments and/or evidence it presented below at the time of summary judgment. In essence, the only proffered justification in the City's summary judgment papers of any consequence that was not in the legislative record was its assertion that its ordinance was justified by the secondary effects in arcades noted in *Hart*. For the reasons articulated by the Court of Appeals below, the secondary effects described in *Hart* do not establish a reasonable basis for the current ordinance. (Pet. App. 20-21.)

Accordingly, even if this Court were to conclude that blatantly pretextual legislation is permissible if in subsequent judicial proceedings a City's lawyers can conjure up evidence or theories which – had they been considered initially – could establish a reasonable basis for the legislation, the City submitted no such evidence or theories by the time of summary judgment. The District Court properly concluded that the City was not entitled to establish such justifications at trial because, under *Celotex*, it had the burden of establishing any such justifications by the time of the court's summary judgment ruling.[27]

For all the reasons above, the District Court was clearly correct in its ruling invalidating the ordinance as a content-based restriction.

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[27] If *Celotex* means anything in this context, it means that the City cannot establish a new evidentiary "reasonable basis" once a case is already on appeal. The City's case for content-neutrality must stand or fall based upon the record it presented at the time of summary judgment.

IV

THE ORDINANCE IS ALSO INVALID IF ANALYZED AS A TIME, PLACE AND MANNER RESTRICTION, BECAUSE IT FAILS TO PROVIDE ADEQUATE ALTERNATIVE CHANNELS OF COMMUNICATION FOR THE PUBLIC TO OBTAIN TRUTHFUL AND USEFUL INFORMATION TO UTILIZE IN DECIDING WHICH SEXUALLY ORIENTED VIDEOTAPES TO RENT OR PURCHASE

One of the key features of this ordinance which *both* lower courts found it unnecessary to address (but which Alameda challenged at all levels below[28]), is that the ordinance prohibits customers from previewing before purchasing a type of film for which – unlike a major studio film – there is virtually no information available to consumers before they make a decision whether to rent or purchase it.

The record reflects that each of these stores carries approximately 6,500 different sexually oriented videotapes for rental and retail sale. (JA 228.) Unlike general release films which have substantial advance promotion, and which are extensively reviewed in both the electronic and print media, there is virtually no information available to the public about the vast majority of sexually oriented videotapes adequate to meaningfully assist the customer in making an informed selection. (JA 242-243, ¶¶ 12-13.) This is significant because, just as is true in the

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[28] Of course, Alameda is entitled to maintain this ground of challenge here. As this Court noted in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634, n.8 (1980): "As a respondent, CBE is entitled to urge its position although the Court of Appeals did not reach it."

wider general release market, there are enormous differences in the scope, variety and content of these types of videos, all of which are meaningful to the consumer considering a purchase or rental of such a video.

Consequently, it is quite common for adult bookstore businesses, like respondents', to allow customers the opportunity, for a small fee, to preview any of the videotapes in the store which they offer for sale or rental. Whether this information is characterized as "commercial expression" or "non-commercial expression," it is unquestionably a type of truthful and useful information to which the public has a right of access under the First Amendment.[29]

The City offered three responses to this argument below, but did not address them in its opening brief herein. Because the City will undoubtedly include them in its reply brief, Alameda will anticipatorily discuss them here.

The City's first response to this argument is that the ordinance does not prohibit a preview system so long as the bookstore allows free previewing of all videotapes. However, it is a practical impossibility for a store to allow free viewing of sexually oriented videotapes. For the same reasons that medical plans always require a small co-payment to reduce freeloaders and overuse of the system, free video previews would destroy any such

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[29] Regardless of whether this material is characterized as "commercial" or "non-commercial" expression, *Alameda* duly argued at all levels below that this restriction fails under a time, place and manner analysis because, *inter alia*, it fails to provide adequate alternative avenues for communication of information about the contents of the thousands of videotapes offered by Alameda.

business with a host of freeloaders and others who would monopolize the store with the free previewing of sexually oriented films. (Moreover, the non-paying "customers" could not be charged a fee if they later elected not to rent the films, because such a charge would then violate the multiple use restriction.)

The City's argument is akin to a suggestion that content-defined expression may be given away, but not sold. Such a concept is anathema to the First Amendment because, absent adequate economic incentive, the marketplace simply will not bear the great cost of producing "free" speech. This is no less true for adult bookstores than for Barnes and Noble or United Artist Theatres. Moreover, as far back as *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952), this Court emphatically rejected the idea "that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit." *Id.* at 501.

It is no more of an answer for Los Angeles to say that Alameda's customers may view all the sexually oriented videotapes of their choice for free than it would be to suggest that America's nationwide theatre chains may exhibit their films as long as they do not charge admission.

The City's second response to this challenge is that customers may glean whatever information they need from the videotape box cover. This argument is equally spurious. Through no fault of retailers such as Alameda, the packaging of these low budget videotapes unfortunately often contains either "puffery" or outright inaccuracies concerning the contents (including the cast) of the film. More to the point though, even if a consumer is

lucky enough to find a video box which accurately depicts one or more of the actors in the enclosed video, merely knowing the identity or appearance of one or more of the cast is a far cry from the type of detailed information one could obtain from actually previewing the videotape. Entire genres of sexually oriented films are based on the development of storylines which significantly affect whether the customer will enjoy their viewing of the film.

Undeniably, many other sexually oriented films make no pretense of a storyline whatsoever. However, the discriminating customer has no basis for distinguishing between these two types of films simply from a box cover.[30]

The City's third response to this argument is that stand-alone arcades will provide an adequate alternative for customers to gain truthful information about the videos which they are considering purchasing or renting from other unrelated stores which sell and rent such videos. This argument is also without merit. The record shows that the two small bookstores owned by respondents each carry approximately 6,500 *different* titles of sexually oriented videos. However, no more than a tiny portion of those videos would ever be available in a

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[30] Because of their generally low budgets, adult videotapes potentially vary widely in quality. Some may be highly scripted and rehearsed, with significant production values; others may be totally impromptu, marked by bad lighting and poor direction. But like movie newspaper ads, all adult video box covers make the advertised film appear world class. In the adult marketplace, there is no substitute for actually previewing the film itself in order to exercise one's consumer rights intelligently.

stand-alone video arcade,[31] (assuming such could even survive *at all*).[32] There would be no financial motivation for a stand-alone video arcade to exhibit the many *thousands* of different videos that would be available for sale or rental in a typical adult bookstore. As a result, only a small fraction of the videos available for sale or rental in a stand-alone adult bookstore would ever be viewable in a theoretical stand-alone adult arcade. Consequently, the City's response does not offer an adequate alternative avenue of communication.

Nor would it make any difference if a stand-alone adult arcade operated inside of a non-adult retail bookstore which also sold a small quantity of adult videos.

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[31] The record indicates that respondents' video booths are of two different types. The majority feature a multi-channel viewing capability which permits patrons to choose from as many as 60 different videos at a time, which videos are selected in advance by the store. The other booths, known as "preview booths," allow a customer to view any of the 6,500 videos on the store's shelves. All videos exhibited in both types of booths are available for rental or purchase. JA 227. Because a stand-alone adult arcade would have no retail inventory, it would have no reason to exhibit more than 60 or so different videos at any point in time.

[32] Because of a prior agreement in this case, Alameda will make no attempt to prove or argue affirmatively that adult video arcades *could not* survive as independent uses. The stipulation was *not*, however, an agreement that the record could reflect that adult arcades *could* independently so exist. Alameda is free to note that the *City* has not affirmatively demonstrated that adult arcades *could* exist independent of a related store which sold adult retail materials. The record is also clear that, regardless of whether it is *possible* for adult arcades to survive independently, none has done so in the city of Los Angeles, nor is there any evidence in this record that they have done so anywhere else.

Los Angeles no longer applies a "preponderance test" for determining whether bookstores are "adult." *See* n.6, *supra*. Consequently, any stand-alone adult arcade which attempted to carry something on the order of 6,500 different sexually oriented videotapes – or any tangible number of them – for sale or rental would unquestionably be deemed an "adult bookstore" as well as an "adult arcade" and, consequently would violate the ordinance.

To the extent the City wanted to make *any* of these arguments, the burden of proof was on the City to demonstrate in the District Court that the suggested alternative avenues of communication were either ample or adequate. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994),[33] and *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981).[34] It made no such effort.

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[33] *Ladue* imposed the burden of proving ample alternatives on the governmental entity. This Court *rejected* Ladue's assertions that various alternative channels of speech existed to save the ordinance from invalidation. It did not require the individual *challenging* the ordinance to prove the *in*adequacy of the asserted alternatives. This Court ruled: "[W]e are not persuaded that adequate substitutes exist for the . . . medium of speech that Ladue has closed off." 512 U.S. at 56. By holding that it was "not persuaded that adequate substitutes exist," this Court clearly imposed the burden of proof to demonstrate the adequacy of those substitutes on the city of Ladue. Likewise here, while the City made a number of assertions below concerning substitutes it contends are "adequate," it has failed to carry its burden to demonstrate the adequacy of those substitutes.

[34] *Schad* also put the burden on government to demonstrate the adequacy of alternative channels because it invalidated Mount Ephraim's zoning restriction only after it pointed out that Mount Ephraim had failed to persuade the Court that sites for adult businesses in surrounding communities constituted an adequate alternative channel of communication. 452 U.S. at 76-77.

In *Ladue*, this Court also provided substantial guidance in determining the "adequacy" of an alternative channel of communication in striking down, under a time, place and manner analysis, an ordinance prohibiting most types of residential signs. The City argued that there were numerous "adequate" alternatives to the information conveyed by these residential signs, including "hand-held signs, 'letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings.' " 512 U.S. at 56. However, this Court concluded that those proffered "alternatives" did not constitute "*adequate* substitutes . . . for the . . . medium of speech that Ladue has closed off." *Id.* (emphasis added).

Obviously, this Court, in *Ladue*, made clear that when looking at the adequacy of so-called "ample alternative avenues of communication," 512 U.S. at 56, the alternatives must be as efficacious as the methods foreclosed by the ordinance; otherwise the ordinance cannot stand. *Id. None* of the alternatives suggested by the City here was shown to be even remotely as efficacious as the method for obtaining information about a film which the City's ordinance forecloses. Accordingly, under the clearly articulated guidelines of *Ladue*, the City's multiple use restriction fails as a time, place and manner restriction, because it does not allow either ample or adequate alternative channels for this information.

V

TO THE EXTENT THE ORDINANCE COMPELS THE PARSING OF ALAMEDA'S EXISTING EXPRESSIVE BUSINESS INTO MORE NARROWLY DEFINED TYPES OF BUSINESSES WHERE FEWER TYPES OF EXPRESSION MAY BE OFFERED, AND WHICH HAVE NOT BEEN SHOWN TO BE CAPABLE OF INDEPENDENT EXISTENCE, IT VIOLATES THE FIRST AMENDMENT

Initially, Alameda acknowledges that it is precluded by stipulation from arguing affirmatively that adult arcades *cannot* exist as stand-alone businesses. However, it may and does argue that the *City* has the burden to demonstrate that adult arcades *can* exist as stand-alone businesses, and the City has failed to meet that burden.

A. The City had the burden to demonstrate that its novel "multi-use" prohibition did not constitute a *de facto* ban on adult arcade businesses; its failure to have met this burden compels application of strict scrutiny.

In addition to its many other flaws, this ordinance constitutes a radical, novel, and unique threat to First Amendment freedoms, because it presages the destruction of expressive businesses by the mechanism of forcing them into progressively more narrowly defined types of businesses, some of which may be incapable of independent existence. Under this precedent, if approved, a single adult business could be legislatively required to offer fewer and fewer types of expression to the public. No prior decisions of this Court have analyzed the unique potential of this type of novel ordinance to pretextually destroy rights of expression. However, the issue is

squarely framed by the present case. The ordinance dictates that if an adult arcade is to operate at all in the City, it must operate as a stand-alone business not related to any other type of adult business.

Yet, the City offered *no* evidence below that a stand-alone adult arcade business has ever existed in Los Angeles other than within a store selling adult media materials. Indeed, the uncontroverted evidence establishes that no such stand-alone businesses have ever existed in Los Angeles, nor, apparently, anywhere else. While this is not proof that an adult arcade business *could not* survive as an independent use, it is surely evidence that none has done so to date.

Where, as here, the record establishes that a city has legislatively relegated a form of expression to a format in which it has never been shown to exist previously, the third part of the First Amendment's time, place and manner test necessarily establishes a rebuttable presumption that such a restriction is a direct and absolute ban on expression. The City may overcome this presumption either by fairly proving that such independent businesses exist, or by establishing that such businesses could reasonably be expected to survive in such a format.[35] The

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[35] This presumption inheres in the third prong of this Court's traditional "time, place and manner" test which affirmatively requires cities to prove that a challenged ordinance will "leave open ample alternative channels for communication." *Ladue*, 512 U.S. at 56. As discussed in notes 33 and 34, *supra*, cities bear the burden of proof with respect to this part of the time, place and manner test. *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000): "When First Amendment compliance is the point to be proved, the risk of non-persuasion – operative in all trials – must rest with the Government." Of course, if a city fails to meet its

City has not met its burden to demonstrate that stand-alone adult arcades *do* exist, or, alternatively, that they could reasonably be expected to exist as independent uses in the future. Absent such a demonstration, it must be presumed the ordinance imposes a *de facto* ban on a medium of expression.[36] Because the City has not rebutted this presumption that its restriction denies ample and adequate alternatives for adult arcade businesses, the ordinance should be subjected to strict, rather than intermediate, scrutiny.

The need for such a rule is compelling. If government were free to mandate the parsing of existing expressive businesses into progressively narrower types of business, the potential would exist for *enormous* abuse, not only in the area of adult media but in connection with any other type of expression disfavored by government officials. Absent imposition of the rebuttable presumption urged by Alameda, cities will be free to justify further devastation of adult media businesses by, for example, separately defining – and then requiring the separation of – "adult *magazine* stores," "adult *book*stores," "adult *greeting card* stores," "adult *videotape* stores," "adult *digital video disc* stores," "adult *newspaper* stores," "adult *male homosexual*

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burden of proving that ample alternatives remain, the ordinance fails the time, place and manner test and is subjected to strict scrutiny.

[36] Moreover, the City has defined "adult arcades" as a distinct medium of expression. *Ladue* precludes banning such a medium: "Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression." 512 U.S. at 55. *Cf. Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 94 (1977) ("That the proscription applies only to one mode of communication . . . does not transform this into a 'time, place, or manner' case.").

bookstores," "adult *lesbian* bookstores," etc. Absent recognition of this constitutional presumption, a city need only state that "all adult businesses have secondary effects; each of the parsed businesses described above is an 'adult business,' and, therefore, they may be compelled to operate at separate locations in order to reduce the 'secondary effects' which occur when they are combined in one location."

The only safeguard which can protect against such an inevitable result is a First Amendment-based rule that cities may not legislatively limit expression to a form in which it has never been shown to exist without demonstrating the likelihood that, once relegated to such a form, such expressive businesses would likely continue to be available to the public. Even if the ordinance does not *expressly* ban such uses, if its practical effect is to make such expression unavailable to consumers, there is a constitutionally cognizable injury *to the public* (as well as the adult business owners) requiring remedy.

This principle is not limited to the adult entertainment context. Hypothetically, assume a city council were vigorously opposed to even first trimester abortions. Under the lax scrutiny urged by Los Angeles, that council could define as separate "uses" and require the separation of: 1) a facility providing abortion counseling (clearly an expressive activity); 2) a facility providing diagnostic tests in connection with abortion pre-operative procedures; and, 3) a facility which actually provides first trimester abortions. As a practical matter, the dramatically increased costs of separate facilities would severely burden providers of abortion-related services, forcing the closure of many existing clinics. The public would be enormously burdened as well. Under the rational basis

standard of scrutiny sought by the City, such a *de facto* burden on abortion clinics could easily masquerade under the pretext of being a content-neutral ordinance designed to reduce the secondary effects caused by anti-abortion demonstrators. *De jure* zoning separations would effect a *de facto* prohibition, all under the talismanic shield of secondary effects zoning concerns.

In short, the constitutional presumption that Alameda advocates is necessary to prevent a city from independently defining (and requiring the separation of) each of the separate adult uses noted above (and doubtless numerous others which motivated foes of erotic expression could conjure up) in the hopes that, by such parsing, adult uses would definitionally be deprived of their ability to survive as independent businesses.

Indeed, that is precisely what appears to have happened here. In its 1977 Study, the City did not identify a single business operated as an "adult arcade" that was not located within a store selling adult materials.[37] Then, in 1983, as a pretextual way of eliminating the medium of video viewing booths, the City presumed to define a new type of independent business (which had never before existed), calling it an "adult arcade," and prohibited such use from operating within an adult bookstore (apparently based on the totally unsupported theory that adult arcades would have fewer presumed secondary effects if

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[37] *See* the District Court's detailed discussion of this point at Pet. App. 37-39. Additionally, the City was asked in discovery to admit that it was aware of no adult arcades other than those within adult bookstores. The City answered that it lacked "sufficient information to respond," even though the request sought information only about the extent of the City's own knowledge. (RA 39-40.)

operated as stand alone businesses than if operated within an adult bookstore).

The only reasonable solution to this threat of "destruction by parsing" is to enforce the "ample alternatives" prong of the time, place and manner test and require that, unless a particular expressive business has been shown to have successfully *existed* in the real world as a stand alone business, or absent a demonstration that such survival would be at least reasonably likely, any municipal zoning ordinance which requires such a business to exist in a form in which it has not been shown to exist, is presumptively a total ban rather than a time, place and manner restriction and, accordingly, must be justified under a test of strict scrutiny.

B. Even if the ordinance were found to be a content-neutral regulation which merely *burdened* but did not *ban* adult arcades, it would nevertheless fall under a test of intermediate First Amendment scrutiny.

1. By requiring the parsing of existing adult bookstores into their component parts, the City has enacted a restriction which burdens substantially more speech than necessary for accomplishing any legitimate purpose underlying its ordinance.

Even if this Court were to conclude that the City met its burden to show its ordinance is not an absolute ban on adult arcades, the ordinance would still be invalid under an *intermediate* standard of First Amendment scrutiny as one which "*bu[r]den[s]* substantially more speech than necessary to further [the asserted governmental] interests."

Turner II, 520 U.S. at 185.[38] As will be shown below, the ordinance fails this test.

a. This ordinance substantially burdens expression.

The record clearly establishes that all adult arcade uses in Los Angeles exist within adult bookstores, and that most adult bookstores include the type of movie or video viewing machines defined under the city's ordinance as "adult arcades." JA 241-242 and 229-231. Even if the current ordinance does not constitute a de facto *ban* of adult arcades, it unquestionably imposes a significant *burden* on the continued existence of such businesses. If this Court were to uphold the ordinance, existing adult arcade uses would be required to relocate to a new address at least 1,000 feet away. Obviously, forced relocation would impose a *very significant* burden on adult arcades.

First, many owners may simply lack the funds to locate, secure, adapt and move to a new location to operate two separated uses. Moreover, the City has adduced no evidence suggesting that the component uses of a traditional adult bookstore *could* operate successfully if split into two locations.

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[38] *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000), stating:

> "It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree."

Even assuming that the *economic* burdens could be overcome, the next obstacle facing such a relocating owner would be to find a feasible site that is not in violation of the city's extensive adult zoning restrictions. As noted by the Court of Appeals in *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030, 114 S.Ct. 1537, 128 L.Ed.2d 190 (1994), there is at least a reasonable likelihood that Los Angeles' adult zoning scheme fails to provide adequate alternative sites for such businesses to allow them a "reasonable opportunity" to relocate.[39]

Next, even if the relocation of a traditional adult bookstore into two separate sites were economically feasible, and a viable site could be found and secured, the site would also have to comply with all applicable city off-street parking requirements, a very significant obstacle in a city legendary for its traffic congestion and which refuses to "grandfather" off-street parking requirements when an existing use is changed to an adult entertainment use.

Finally, as noted above, the ordinance severely burdens, if not eliminates, the public's access to meaningful information as to the contents of adult videotapes to allow meaningful decision-making when selecting sexually oriented videotapes to purchase or rent. This burden on the public's access is severe.

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[39] Alameda's complaint challenged the *entirety* of § 12.70C based on this lack of a constitutionally adequate number of relocation sites. However, because the Court granted summary judgment on an alternate ground, the parties never litigated the question of whether the ordinance provides a sufficient number of such sites.

b. There are many far more effective alternatives which burden substantially less expression than the City's ban on all multi-use adult businesses.

To the extent that any adverse secondary effects are generated by a traditional adult bookstore with video viewing booths, *numerous* alternative remedies are available to the City, many of which it has in fact – presumably successfully – already employed. These alternatives are far more effective than the multi-use restriction in ameliorating any claimed secondary effects and burden substantially less expression.

The most significant alternative remedy is present in other zoning restrictions contained in the very section of the municipal code before the Court, i.e., L.A.M.C. § 12.70C.[40] In 1984, and again in 1986, the locational restrictions of § 12.70C were made far more rigid than they were in 1983 when the "multiple use" restriction was adopted. Specifically, the City amended § 12.70C by prohibiting adult businesses from locating within 500 feet of any residential or agricultural zone or any property within the CR, C1 or C1.5 zones. By further separating adult businesses from "sensitive uses," these new restrictions provided far more protection against any asserted "secondary effects" than existed in 1983 when the pretextual provision before this Court was adopted. Moreover, the record reflects that both of respondents' businesses are in full compliance with these provisions and are also in compliance with the pre-existing requirements that they be located more than 500 feet from any church,

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[40] Although the City has not provided this Court a copy of the current provisions of L.A.M.C. § 12.70C, it is set forth accurately at RA 25-26 and was judicially noticed by the District Court pursuant to the request of Alameda.

school or park and more than 1,000 feet from any other unrelated adult entertainment business.

The City also has other very substantial alternative remedies to supplement the stringent new provisions of the balance of § 12.70C. Specifically, subsequent to the City's 1977 Study which attempted to demonstrate secondary effects related to adult businesses, the City enacted a comprehensive ordinance regulating and restricting the operation of adult arcade businesses (alternatively defined under the code as "picture arcades"). (A copy of that ordinance was the subject of a judicial notice request in the District Court and is reproduced at RA 33-37.) Specifically, in November of 1977, and five months *after* the completion of City's Adult Zoning Study, the City enacted L.A.M.C. § 103.101, which: (1) requires the removal of doors from the video viewing booths; (2) requires that their entire interior be visible upon entrance to the premises; (3) imposes a minimal lighting requirement; and (4) provides for revocation or suspension of an arcade permit if the permittee knowingly allows the arcade to be used as a place where any sexual acts openly occur. This is another more effective and significantly less restrictive alternative than the excessively burdensome ordinance challenged here.

Of course, in addition to the latter two ordinance provisions, the City is armed with the full panoply of city and state public nuisance and red light abatement laws to prevent any prostitution-related or other unlawful activity. *See, e.g., Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986).

For each of the reasons above, this ordinance clearly imposes a very substantial burden on expression (if not an outright ban) and there are numerous highly effective remedies available to the City which would have a far

less burdensome impact on expression. Accordingly, under a test of intermediate scrutiny as well, the ordinance is unconstitutional.

CONCLUSION

For all the reasons above, the judgment of the Court of Appeals should be affirmed.

DATED: August 17, 2001

Respectfully submitted,

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AUG 17 2001

(13)

Supreme Court, U.S.
FILED
AUG 17 2001
OFFICE OF THE CLERK

No. 00-799

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' APPENDIX

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[1] Portions of this Declaration were included in the Joint Appendix. However, the excerpts included here are more complete.

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California Corporation; *et al.*,

Plaintiffs,

v.

CITY OF LOS ANGELES, a municipal corporation,

Defendant.

Case No. CV 95-7771 DDP (CTx)

DECLARATION OF G. RANDALL GARROU IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

Hearing:

Date: August 25, 1997
Time: 10:00 a.m.
Ctrm: 24

DECLARATION OF G. RANDALL GARROU

(28 U.S.C. § 1746)

(Filed July 1, 1997)

I, G. Randall Garrou, hereby declare:

1. The following statements are true of my own personal knowledge. If called upon, I could and would testify to the following.

[NOTE: ¶¶ 2-27 are omitted; ¶¶ 2-13 can be found in the Joint Appendix at J.A. 240-244.]

* * *

VAGUENESS

28. I have personally dealt with City zoning officials in connection with at least five different combination adult bookstores/adult arcades wherein my clients had actually attempted to convert either the retail sales portion of their store or the video viewing booth portion of their store to a "nonadult" activity. I also was involved in discussions with city zoning officials regarding another client's request for information as to how to go about such a conversion. These six interactions involved the following stores and related administrative proceedings:

(1) New Wave Inc.'s business at 6452 Lankershim Blvd. (Administrative appeal from the denial of an extension from compliance with the adult zoning ordinance where the denial was based upon the theory that New Wave's store constituted an unlawful nonconforming use by virtue of the presence of both an "adult bookstore" and an "adult arcade" – New Wave had attempted to operate both of those aspects of its business in a "non-adult" manner. Zoning Administrator No. ZA 88-0266(AE); Board of Zoning Appeals Case No. 3810; City Council Appeal No. 89-0044).

(2) E.W.A.P. Inc.'s business at 12323 Ventura Blvd. (Administrative appeal from denial of an extension application – City characterized business as constituting two distinct "adult" entertainment businesses, i.e., an "adult bookstore" and an "adult arcade", even though E.W.A.P., INC. had attempted to operate its video viewing booths to show a majority of non-adult entertainment films – Zoning Administrator No. ZA 88-0149(AE); Board of Zoning Appeals Case No. 3835; City Council File No. 88-2039.)

(3) Stuart Parr's business at 6408 Tujunga Ave. (Administrative appeal from the denial of extension application – City characterized business as constituting two distinct "adult" businesses, i.e., an "adult bookstore" and an "adult arcade", even though a preponderence of the inventory was nonadult. This ruling was rendered in Zoning Administrator Case No. ZA 88-0265 (AE) and was affirmed on appeal by the Board of Zoning Appeals in BZA Case No. 3807 and then by the City Council in Council File No. 89-2666.)

(4) Topanga Press, Inc.'s business at 7566 Melrose Ave. (Administrative appeal from an order to comply charging it as unlawfully operating an "adult bookstore" within 500 feet of a residential zone even

though over two thirds of its inventory was non-adult. Affirmed on appeal in Zoning Administrator Case No. ZA 88-1054(A), and again in Board of Zoning Appeals Case No. B.Z.A. 3932.)

(5) Brand X Video, Inc.'s business at 6161 Van Nuys Blvd. (Informal, but frequent telephonic discussions with Building & Safety official John Mepham (and one with Mr. Harold Lambert) inquiring as to how to go about converting Brand X to a "non-adult" bookstore, after issuance of an Order To Comply.)

(6) In Hand Book & Video, located at 5648 Vineland Ave. (I represented In Hand at a City Attorney Hearing on September 12, 1988, attended by City Attorney Hearing Officer Robin Weinstein and two Building & Safety officials, including Senior Building & Safety Supervisor Ron Black. The City rejected In Hand's attempt to convert to a "non-adult" bookstore and refused to give any objective or measurable guidelines for compliance.)

29. Although all six of these stores either attempted to, or expressed a desire to, follow the clear guidelines then established by the California Courts of Appeal in *Pringle v. City of Covina*, 115 Cal.App.3d 151, 171 Cal.Rptr. 251 (1981) and *Kuhns v. Santa Cruz County Board of Supervisors*, 128 Cal.App.3d 369, 181 Cal.Rptr. 1 (1982) for achieving "non-adult" status (i.e., they complied with the then-applicable "preponderance test"), in not one of the six locations did the City acquiesce in the constructions mandated by those Court of Appeal opinions. Moreover,

in each of these six proceedings, I implored city officials to explain what specific tests or criteria they were using in rendering their determination that a particular use was an "adult" use. Although all but one of these stores' legal positions were determined in formal administrative proceedings, (three of which involved fully exhausted administrative appeals), unfortunately, in not one of the proceedings with which I was involved did *any* of the City officials *ever* give *any* objective guidelines or criteria which I could communicate to my clients for how to go about complying with the ordinance while continuing to maintain the maximum allowable amount of adult materials. In virtually every proceeding, the City officials candidly admitted that it was a completely subjective test and it depended upon whether the particular location struck the particular City zoning inspector as an "adult bookstore" or "adult arcade" based on nothing but that zoning inspector's personal opinions.

30. Obviously, there was no way I could provide any objective guidelines upon which my clients could rely for this conversion process.

31. The attempt made by Drake's bookstore (operated by Topanga Press, Inc.) is instructive of the problems my clients faced in converting into "non-adult" businesses. Indeed, the proceedings in many of the other administrative appeals with which I was involved were delayed in order to see what test, if any, would evolve from the *Drake's* case.

32. Although Drake's had converted over two-thirds of its inventory to "nonadult" materials, and had entirely eliminated *all* of its video viewing booths, the

City still insisted on characterizing it as an "adult bookstore," and repeatedly declined the requests both of my clients and of our office for any type of guidelines which Drake's could follow in order to achieve compliance as a "non-adult" store. These requests were made both orally and formally in writing.

33. I personally handled Topanga Press' administrative appeal from an Order To Comply which issued on July 8, 1988, asserting that it was operating an "adult bookstore" unlawfully within 500 feet of a residential zone. Our defense was solely that Drake's was not in fact an "adult bookstore", given that over 2/3 of its inventory was "non-adult". After unsuccessfully appealing an Order To Comply to the Chief Zoning Administrator, I thereafter presented Topanga Press' appeal to the Los Angeles Board of Zoning Appeals, the final agency entitled by law to rule upon their appeal. Unfortunately, only four of the five Board members were present for the hearing on that appeal. At the conclusion of all the evidence, the two Board members who were lawyers agreed with me that Drake's had completely complied with all of the then-existing tests set forth both by the ordinance and by case law and voted to reverse the Order To Comply. However, the two nonlawyer members voted to deny Drake's appeal and, as a result, the Order To Comply was upheld by a split vote of the Board of Zoning Appeals.

34. Once again, neither the Chief Zoning Administrator nor the Board of Zoning Appeals issued any objective tests by which Topanga Press (or anyone else) could attempt to achieve compliance in the future as a "non-adult" bookstore containing some lesser amount of adult entertainment materials.

35. As lead counsel in the *Topanga Press* litigation, I was present at the depositions of the following three Los Angeles city officials: (1) John Mepham, a building inspector for the Los Angeles Department of Building and Safety in 1990; (2) James Carney, the Chief Inspector for the Commercial Division of the Bureau of Community Safety for the Los Angeles Department of Building and Safety in 1990; and (3) Franklin Eberhard, the Chief Zoning Administrator of the City of Los Angeles in 1990, all of which were taken in January of 1990. True copies of the cover page, court reporter's certification page and relevant interior pages of their deposition transcripts are attached as Exhibits A, B and C respectively hereto.

36. At those depositions, none of the above city officials was able to articulate a single, standardized, objective, or consistent administrative interpretation of the meaning of the term "adult bookstore" as it appears and is used in L.A.M.C. § 12.70B-2.

37. Based upon my foregoing experiences, it is my opinion that the plaintiffs in this lawsuit cannot safely make any attempt to carry the maximum amount of legally permissible adult inventory at their stores which would still allow them to be characterized as a "non-adult" bookstore. It is further my opinion that the City's pattern of enforcement of its "adult bookstore" definition is entirely arbitrary and is totally dependent upon the personal predilections of the relevant building and safety inspector, zoning administrator, police officer, or judge reviewing the facts in a particular case.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of June, 1997, within the United States of America.

/s/ G. Randall Garrou
G. RANDALL GARROU

SELECTED EXCERPTS FROM EXHIBIT "A" TO GARROU DECLARATION CONSISTING OF COVER PAGE AND COURT REPORTER CERTIFICATION PAGE AND RELEVANT INTERIOR PAGES OF THE DEPOSITION OF JOHN ROGER MEPHAM TAKEN ON JANUARY 12, 1990 IN *TOPANGA PRESS V. THE CITY OF LOS ANGELES*, USDC CD CAL CASE NO. CV-88-7838 RG

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TOPANGA PRESS, INC., Plaintiff, vs. CITY OF LOS ANGELES, etc., et al., Defendants.	)	Case No. CV-88-7838 RG (Kx)

DEPOSITION OF JOHN ROGER MEPHAM

Beverly Hills, California
January 12, 1990

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REPORTED BY: Cheryle Lewis, C.S.R. No. 6312
OUR FILE NO. 5347

* * *

[p. 90] * * *

Q When Mr. Sarno was using the word "quantity" in terms of his questions to you regarding the standard to use in evaluating whether a bookstore was an adult bookstore or not, did you construe those questions to be related to the percentage of material involved?

A As it relates to his questions?

Q Yes.

A Yes, I do.

Q So is it your belief that there is no particular percentage of inventory of a bookstore that would qualify it as an adult bookstore under the Los Angeles Municipal Code?

A To the best of my knowledge, there is no definitive percentage within the L.A. Municipal Code.

Q So it is possible that if a bookstore was, for example, 30 percent adult item-by-item inventory and 70 percent nonadult item-by-item inventory it could be an adult bookstore under the Los Angeles Municipal Code?

A I believe it could.

Q Did you also take into consideration the fact that sexual paraphernalia in a store is included in the definition of an adult bookstore within the Los Angeles Municipal Code when you evaluated Drake's bookstore?

[p. 91] A I did take that into account.

Q Did you believe that a substantial portion of the material in Drake's bookstore, including the published items and the paraphernalia was adult on any of your investigations of the bookstore?

A I did.

Q Would it have mattered how the material was advertised in Drake's in terms of, for example, signage

outside the store or inside the store in your determination that it was an adult bookstore under the Los Angeles Municipal Code?

A That could have played a role.

Q Did it in this case?

A It did not.

MR. MOONEY: I don't have anything further.

FURTHER EXAMINATION

BY MR. SARNO:

Q A series of questions you were just asked regarding your understanding of the application of the adult zoning ordinance, the question that was posed to you was if the percentage of the material was 30 percent adult and 70 percent nonadult, would that necessarily mean that the place is not an adult bookstore.

[p. 92] A Would not necessarily mean that.

Q So even with 30 percent of the material as adult, it could still be an adult bookstore in your determination?

A I believe so, yes.

Q What if there were only 10 percent of the material was adult, could it still be an adult bookstore?

A Yes.

Q What it if were only 1 percent of the location, could it still be an adult bookstore?

A You're asking me to speculate. It's conceivable. Again, every situation is different and should be weighed on its own.

Q Is it fair to say that within the realm of the application of 12.70 you could conceive of circumstances under which a bookstore might possess only 1 percent adult material and still be an adult location under the ordinance?

A That's speculation and not related, I don't think.

Q But you could make the determination with respect to 10 percent?

A I could. And there are situations, I think, that could.

Q How about 5 percent? Is it possible that an [p. 93] adult location could have –

A I'm not going to be able to give you a finite answer, again, because situations are different. The material is different. And I don't think there is a finite answer in this case. There are many scenarios that could occur that could play determining factors in making that decision.

It's conceivable it would probably be a wild circumstance that it could occur under, but, yes, I do believe it is conceivable.

Q That you could have a location with less than 10 percent of adult material, and it could fall within the classification of adult bookstore under the ordinance?

A In my mind, it could.

Q As inspector applying this ordinance?

A I can envision scenarios where it would happen.

Q Could you describe a scenario in which it would happen.

MR. MOONEY: Object at this time as being speculative and not relevant.

BY MR. SARNO:

Q Could you conceive of a scenario in which that would occur?

A I could.

* * *

SELECTED EXCERPTS FROM EXHIBIT "B" TO GARROU DECLARATION CONSISTING OF COVER PAGE AND COURT REPORTER CERTIFICATION PAGE AND RELEVANT INTERIOR PAGES OF THE DEPOSITION TRANSCRIPT OF JAMES CARNEY TAKEN ON JANUARY 26, 1990 IN *TOPANGA PRESS V. THE CITY OF LOS ANGELES*, USDC CD CAL CASE NO. CV-88-7838 RG

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TOPANGA PRESS, INC., Plaintiff, vs. CITY OF LOS ANGELES, a municipal corporation, etc., et al., Defendants.	)	No. CV 8807838 (Kx)

DEPOSITION OF JAMES CARNEY

Beverly Hills, California
January 26, 1990

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REPORTED BY: Cheryle Lewis, C.S.R. No. 6312
OUR FILE NO. 5413

* * *

[p. 61] * * *

Q And could you define the element that you would rely upon to arrive at the impression that a location was adult?

MR. MOONEY: Again, just for the record, just a reiteration of the relevance of this inquiry based upon the objections stated before as to standards, as to failure of the complaint to supply a prima facie case of vagueness

or equal protection violation. You may answer the question.

THE WITNESS: Could you repeat that question.

BY MR. SARNO:

Q Let's go back.

I believe that your answer was that in applying the substantial test of 12.70B, the way you were applying it prior to July 8 was basically if upon entering the location the inspector received the impression that it was adult; is that correct?

A That's correct.

Q Were there any criteria that were to be utilized by inspectors as elements in this impression test that was being utilized?

A No.

Q And there was no numerical element in [p. 62] this impression test as to the quantity of material for sale or the quantity of the adult material for sale?

A Well, as far as numerical, it had to be substantial, which meant it had to be more than a few.

Q Obviously if all of the material was adult, then clearly it was adult; right?

A That's correct.

Q And if none of the material was adult, then it was not adult?

A Yes.

Q But somewhere in between those two extremes a location would cease to be non-adult and would become adult; is that correct?

A Yes.

Q And can you give me any indication as to at what point a location would cease to be non-adult and would become adult by virtue of the quantity of the adult material that was contained there?

MR. MOONEY: Well, an additional objection here based on the fact that this is clearly unrelated to the store involved. It involves speculation unrelated to the case, but you can answer the question or maybe you can't, I don't know.

THE WITNESS: All I can say is there's no numerical point that I can name. I can't name you a number [p. 63] as being it. I could foresee that it could be anywhere from 1 percent to 99 percent. It could fall in one or the two categories.

BY MR. SARNO:

Q So it is conceivable in terms of your interpretation of the substantial test that it is conceivable that a location that possessed 2 percent of the total inventory as adult might nevertheless be classified as an adult location under the substantial test; is that correct?

MR. MOONEY: Same objection.

THE WITNESS: It's conceivable, yes. A lot of it depends on the merchandise, what is there, the size of it, everything else.

* * *

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California Corporation; and HIGHLAND BOOKS, INC., a California Corporation, Plaintiffs, v. CITY OF LOS ANGELES, a municipal corporation, Defendant.	Case No. **95-7771 GHK (CTx)** **PLAINTIFF'S REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE** (Filed Nov. 15, 1995)

Pursuant to this notice, plaintiffs hereby request the Court to take mandatory judicial notice, pursuant to the

provisions of Rule 201(b) and (d) of the Federal Rules of Evidence, of the following documents:

1. The following ordinances passed by the City of Los Angeles:

a. Ordinance No. 151,294 enacted on July 28, 1978 and effective on September 1, 1978 (a true copy of which is attached hereto as Exhibit A).

b. Ordinance No. 155,718 enacted on August 3, 1981 and effective on August 6, 1981 (a true copy of which is attached hereto as Exhibit B).

c. Ordinance No. 156,509 enacted on March 10, 1982 and effective on March 16, 1982 (a true copy of which is attached hereto as Exhibit C).

d. Ordinance No. 157,538 enacted on March 22, 1983 and effective on May 13, 1983 (a true copy of which is attached hereto as Exhibit D).

e. Ordinance No. 155,579 enacted on December 16, 1983 and effective on January 23, 1984 (a true copy of which is attached hereto as Exhibit E).

f. Ordinance No. 161,111 enacted on April 11, 1986 and effective on May 18, 1986 (a true copy of which is attached hereto as Exhibit F).

2. Los Angeles Municipal Code Section 12.70 in its entirety as it currently exists. (A true copy of this section is attached hereto as Exhibit G.)

DATED: November 13, 1995

Respectfully submitted,

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JOHN H. WESTON
MELANIE D. LONG
WESTON, SARNO, GARROU
& DeWITT

By /s/ G. R. Garrou
G. RANDALL GARROU

Attorneys for plaintiffs

EXHIBIT "G"

Los Angeles Municipal Code Section 12.70
(Current Version)

SEC. 12.70. ADULT ENTERTAINMENT ZONING.
(Added by Ord. No. 151,294, Eff. 9/1/78.)

A. Purpose. It is the purpose and object of this section to establish reasonable and uniform regulations to prevent the continued concentration of adult entertainment businesses, as defined herein, within the City of Los Angeles.

B. Definitions. For the purpose of this section, certain terms and words are defined as follows:

1. "**Adult Arcade**" – An establishment where, for any form of consideration, one or more motion picture projectors, slide projectors or similar machines, for viewing by five or fewer persons each, are used to show films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "**specified sexual activities**" or "**specified anatomical areas.**"

2. "**Adult Bookstores**" – An establishment which has a substantial portion of its stock-in-trade and offers for sale for any form of consideration any one or more of the following:

(a) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by an emphasis upon the depiction or description of

"**specified sexual activities**" or "**specified anatomical areas;**" or

(b) instruments, devices or paraphernalia which are designed for use in connection with "**specified sexual activities.**"

3. "**Adult Cabaret**" – A nightclub, bar, restaurant or similar establishment which regularly features live performances which are characterized by the exposure of "**specified anatomical areas**" or by "**specified sexual activities,**" or films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "**specified sexual activities**" or "**specified anatomical areas.**"

4. "**Adult Motel**" – A motel or similar establishment offering public accommodations for any form of consideration which provides patrons with closed circuit television transmissions, films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "**specified sexual activities**" or "**specified anatomical areas.**"

5. "**Adult Motion Picture Theater**" – An establishment where, for any form of consideration, films, motion pictures, video cassettes, slides or similar reproductions are shown, and in which a substantial portion of the total presentation time is devoted to the showing of material which is characterized by an emphasis upon the depiction or description of "**specified sexual activities**" or "**specified anatomical areas.**"

6. "**Adult Theater**" – A theater concert hall, auditorium or similar establishment which, for any

form of consideration, regularly features live performances which are characterized by the exposure of "**specified anatomical areas**" or by "**specified sexual activities.**"

7. "**Establishment**" (**Amended by Ord. No. 157,538. Eff. 5/13/83.**) – As used in Subsection C hereof, the "**establishment**" of an adult entertainment business shall mean and include any of the following:

(a) The opening or commencement of any such business as a new business;

(b) The conversion of an existing business, whether or not an adult entertainment business, to any of the adult entertainment businesses defined herein; or

(c) The relocation of any such business.

8. "**Massage Parlor**" – An establishment where, for any form of consideration, massage, alcohol rub, fomentation, electric or magnetic treatment, or similar treatment or manipulation of the human body is administered, unless such treatment or manipulation is administered by a medical practitioner, chiropractor, acupuncturist, physical therapist or similar professional person licensed by the State of California. This definition does not include an athletic club, health club, school, gymnasium, state licensed cosmetology or barber establishment, reducing salon, spa or similar establishment where massage or similar manipulation of the human body is offered as an incidental or accessory service. (**Amended by Ord. No. 155,718. Eff. 8/6/81.**)

9. "**Public Park**" – A park, playground, swimming pool, beach, pier, reservoir, golf course or similar athletic field within the City of Los Angeles which is under the control, operation or management of the

City Board of Recreation and Park Commissioners or the County Department of Beaches.

10. "**Religious Institution**" – A building which is used primarily for religious worship and related religious activities.

11. "**School**" – An institution of learning for minors, whether public or private which offers instruction in those courses of study required by the California Education Code or which is maintained pursuant to standards set by the State Board of Education. This definition includes a nursery school, kindergarten, elementary school, junior high school, senior high school or any special institution of learning under the jurisdiction of the State Department of Education, but it does not include a vocational or professional institution or an institution of higher education, including a community or junior college, college or university.

12. "**Sexual Encounter Establishment**" – An establishment, other than a hotel, motel or similar establishment offering public accommodations, which, for any form of consideration, provides a place where two or more persons may congregate, associate or consort in connection with "**specified sexual activities**" or the exposure of "**specified anatomical areas.**" This definition does not include an establishment where a medical practitioner, psychologist, psychiatrist or similar professional person licensed by the State of California engages in sexual therapy.

13. "**Specified Anatomical Areas**" – As used herein, "**specified anatomical areas**" shall mean and include any of the following:

(a) Less than completely and opaquely covered human genitals, pubic region, buttocks,

anus or female breasts below a point immediately above the top of the areolas; or

(b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

14. "**Specified Sexual Activities**" – As used herein, "**specified sexual activities**" shall mean and include any of the following:

(a) The fondling or other erotic touching of human genitals, pubic region, buttocks, anus or female breasts;

(b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation or sodomy;

(c) Masturbation, actual or simulated; or

(d) Excretory functions as part of or in connection with any of the activities set forth in (a) through (c) above.

15. "**Substantial Enlargement**" – As used in Subsection C hereof, the "**substantial enlargement**" of an adult entertainment business shall mean the increase in floor area occupied by the business by more than fifty percent (50%), as such floor area exists on the effective date of this section.

16. "**Transfer of Ownership or control**" – As used in Subsections C and E hereof, the "transfer of ownership or control" of an adult entertainment business shall mean and include any of the following:

(a) The sale, lease or sublease of such business;

(b) The transfer of securities which constitute a controlling interest in such business, whether by sale, exchange or similar means; or

(c) The establishment of a trust, gift or other similar legal device which transfers the ownership or control of such business, except for transfer by bequest or other operation of law upon the death of the person possessing such ownership or control.

17. "**Adult Entertainment Business**" – Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theatre, Adult Theatre, Massage Parlor, or Sexual Encounter Establishment, as defined herein, and each shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment. (**Added by Ord. No. 157,538, Eff. 5/13/83.**)

C. Prohibition. (Amended by Ord. No. 158,579, Eff. 1/23/84.) No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an adult entertainment business within 1,000 feet of another adult entertainment business, or within 500 feet of a religious institution, school, or public park within the City of Los Angeles. No person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof, or the increase of floor area of any adult entertainment business in any building, structure or portion thereof containing another adult entertainment business.

No person shall cause or permit the establishment, or substantial enlargement of an adult entertainment business within 500 feet of any lot in an "A" or "R" zone, or within the "CR", "C1", or "C1.5" zones in the City of Los Angeles.

After March 6, 1988, no person shall cause or permit the continued operation, maintenance, or use of a lot, building or structure, or any portion thereof as an Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theater, Adult Theater, Massage Parlor or Sexual Encounter Establishment, within 500 feet of any lot in an "A" zone or "R" zone, or within the "CR", "C1" or "C1.5" zones in the City of Los Angeles. (**Added by Ord. No. 161,111, Eff. 5/18/86.**)

D. Measurement Of Distance. The distance between any two adult entertainment businesses shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of each business. The distance between any adult entertainment business and any religious institution, school or public park shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of the adult entertainment business to the closest property line of the religious institution, school or public park.

E. Exceptions.

1. A person possessing ownership or control of an adult entertainment business which is within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park on the effective date of this ordinance shall be permitted to transfer such ownership or control within two (2) years of said effective date. The person acquiring such ownership or control, however, shall be required to discontinue said adult entertainment business within five (5) years from the date of said transfer of ownership or control, if such business continues to be within 1,000 feet of another such

business or within 500 feet of any religious institution, school or public park.

2. A person possessing ownership or control of an adult entertainment business shall be permitted to transfer such ownership or control if such business is not within 500 feet of any religious institution, school or public park and the only other adult entertainment business or businesses within 1,000 feet of such business have been established under a variance from the requirements of this section, pursuant to the variance provisions set forth in Section 12.27 of this Code. This exception shall not, however, apply to an adult entertainment business which has been established under such a variance.

3. Except for an adult entertainment business required to be discontinued pursuant to Subdivision 1 of this subsection, if more than one adult entertainment businesses exists in the same building, structure or portion thereof, then all may be continued until March 10, 1985. At that time all shall be discontinued except those established prior to September 1, 1978; but if none of the adult entertainment businesses were established prior to September 1, 1978, then all shall be discontinued except for one, and in case of a dispute the adult entertainment business established first shall have the priority right to continue.

4. An adult entertainment business may be continued, or established and maintained, pursuant to Section 12.22A20. **(Amended by Ord. No. 161,111, Eff. 5/18/86.)**

F. Severability. If any If any provision or clause of this section or the application thereof to any person or circumstance is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such

invalidity shall not affect other section provisions, clauses or applications thereof which can be implemented without the invalid provision, clause or application thereof, and to this end the provisions and clauses of this section are declared to be severable.

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California Corporation; *et al.*, plaintiffs, v. CITY OF LOS ANGELES, a municipal corporation, defendant.	Case No. CV 95-7771 DDP (CTx) **PLAINTIFFS' FOURTH REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE** Hearing: Date: August 25, 1997 Time: 10:00 a.m. Ctrm: 24 (Filed Jul. 1, 1997)

Pursuant to this notice, plaintiffs hereby request the Court to take mandatory judicial notice, pursuant to the provisions of Rule 201(b) and (d) of the Federal Rules of Evidence, of the following documents filed in the following cases:

Steven A. Diamond and Diamond Video World, Inc. v. City of Los Angeles, C.D. Cal. No. CV-95-1534 AWT

1. Complaint for Injunctive and Declaratory Relief filed on or about March 13, 1995 (a true copy of which is attached hereto as Exhibit "A").

2. Order on Motion for Preliminary Injunction filed on or about June 9, 1995 (a true copy of which is attached hereto as Exhibit "B").

3. Preliminary Injunction filed on or about June 9, 1995 (a true copy of which is attached hereto as Exhibit "C").

4. Stipulation for Entry of Judgment and Order Thereon filed on or about November 6, 1995 (a true copy of which is attached hereto as Exhibit "D").

5. Permanent Injunction filed on or about November 6, 1995 (a true copy of which is attached hereto as Exhibit "E").

E.W.A.P., Inc. v. City of Los Angeles, C.D. Cal. No. 95-1711 AWT

1. Complaint for Injunctive and Declaratory Relief and Damages filed on or about March 17, 1995 (a true copy of which is attached hereto as Exhibit "F").

2. Declarations of David M. Brown (together with Exhibits "A" & "B"); John R. DeMott; Lynn Swanson; Jeff Johnson; Jeffrey J. Douglas and Appendix "A" filed on or about March 31, 1995 (a true copy of which is attached hereto as Exhibit "G").

3. Order on Motion for Preliminary Injunction filed on or about June 9, 1995 (a true copy of which is attached hereto as Exhibit "H").

4. Preliminary Injunction filed on or about June 9, 1995 (a true copy of which is attached hereto as Exhibit "I").

5. Stipulation for Entry of Judgment and Order Thereon filed on or about October 12, 1995 (a true copy of which is attached hereto as Exhibit "J").

6. Permanent Injunction filed on or about October 12, 1995 (a true copy of which is attached hereto as Exhibit "K").

New Wave, Inc., et al. v. City of Los Angeles, C.D. Cal. No. CV 91-0689 WDK (Ex)

1. First Amended Complaint for Declaratory and Injunctive Relief Under 42 U.S.C. § 1983 filed on or about February 11, 1991 (a true copy of which is attached hereto as Exhibit "L").

Topanga Press, Inc., et al. v. City of Los Angeles, C.D. Cal. No. CV 88-7838 RG

1. Stipulation and Order Consolidating Cases Under Low Case Number filed on or about February 13, 1991 (a true copy of which is attached hereto as Exhibit "M").

2. Declaration of Steve Wiener in Support of Motions for Preliminary Injunction by Hardrock, Inc., Whitey, Inc. and Beverly Books, Inc. filed on or about February 19, 1991 (a true copy of which is attached hereto as Exhibit "N").

3. Preliminary Injunction filed on June 22, 1991 and entered on September 30, 1992 *nunc pro tunc* (a true copy of which is attached hereto as Exhibit "O").

4. Stipulated Order for Permanent Injunction filed on or about February 24, 1995 (a true copy of which is attached hereto as Exhibit "P").

5. Stipulated Order of Judgment filed on or about March 1, 1995 (a true copy of which is attached hereto as Exhibit "Q").

We also request the Court to take judicial notice of Los Angeles Municipal Code § 103.101, "Picture Arcade" (a true copy of which is attached hereto as Exhibit "R").

Finally, we request the Court to take judicial notice of the district court docket sheets in *Diamond v. City of Los Angeles*, C.D. Cal. No. CV-95-1534 AWT and *E.W.A.P., Inc. v. City of Los Angeles*, C.D. Cal. No. 95-1711 AWT (true copies of which are attached hereto as Exhibit "S" and Exhibit "T" respectively).

DATED: June 30, 1997

Respectfully submitted,

G. RANDALL GARROU
MELANIE D. LONG
WESTON, GARROU & DeWITT

By /s/ G. Randall Garrou
G. RANDALL GARROU

Attorneys for plaintiff

EXHIBIT "R"

LOS ANGELES MUNICIPAL CODE § 103.101, "PICTURE ARCADE"

DIVISION 7

SEC. 103.101. PICTURE ARCADE.

(a) **Picture Arcade Defined.** As used in this article, "picture arcade" shall mean any place to which the public is admitted wherein one or more coin or slug-operated, or electrically, electronically or mechanically controlled still or motion picture machines or projectors are maintained to show still or motion pictures to five or fewer persons per machines at any one time. **(Amended by Ord. No. 150,184, Eff. 11/7/77.)**

(b) **Permit Required. (Amended by Ord. No. 150,184, Eff. 11/7/77.)** No person shall operate, maintain, manage or conduct a picture arcade without a written permit from the Board.

The provisions of this section shall govern the power of the Board to issue, deny, suspend or revoke a permit, or to impose conditions on the retention of a permit in connection with the picture arcade business, notwithstanding the provisions of Sections 103.29 and 103.31 of this Code.

EXCEPTION:

No permit shall be required under this section if the person engaged in the operation of the arcade has a valid carnival permit issued under the provisions of Division 7 of Chapter 10 of this Code and an arcade is therein permitted.

(c) **Issuance of Permit. (Amended by Ord. No. 150,184, Eff. 11/7/77.)** After an investigation the Board shall issue a permit if it finds:

(1) That the business for which a permit is required, herein, be carried on in a building, structure and location which complies with the requirements and meets the standards of the health, zoning, fire and safety laws of the State of California and ordinances of the City of Los Angeles applicable thereto, and the requirements of Subsections (i) and (j) hereof;

(2) That the applicant, his or her employee, agent, partner, director, officer, stockholder, or manager has not knowingly made any false, misleading or fraudulent statement of material fact in the application for permit, or in any report or record required to be filed with the Board;

(3) That the applicant has not had a picture arcade or arcade permit revoked by the Board within two years of the date of the application;

(4) That on the date that the business for which a permit is required herein commences, and thereafter, there will be a responsible person on the premises to act as manager at all times during which the business is open. **(Amended by Ord. No. 155,715, Eff. 9/12/81.)**

(5) (None)

(d) **Decision of the Board.** The decision of the Board regarding a permit application shall be issued within 30 days of the date of the filing of the application unless the Board has set the matter for hearing. Such hearing must be held and decision rendered within 50 days from the date of the application unless the matter is

continued at the request of the applicant. No application for a permit shall be denied without giving the applicant an opportunity for a hearing. **(Amended by Ord. No. 150,184, Eff. 11/7/77.)**

(e) **Suspension or Revocation of Permit. (Amended by Ord. No. 150,184, Eff. 11/7/77.)** After an investigation, notice and hearing, the Board shall suspend or revoke an existing permit, or impose such conditions upon the retention of the permit as shall be found to be necessary to assure the preservation of the public health and safety, if the evidence presented establishes that one or more of the following conditions exist:

(1) The building, structure, equipment, location or manner of operation of such business does not comply with the requirements of or fails to meet the standards of the health, zoning, fire and safety laws of the State of California and ordinances of the City of Los Angeles applicable thereto, and the requirements of Subsections (i) and (j) hereof. **(Amended by Ord. No. 162,946, Eff. 12/19/87.)**

(2) The permittee, his or her employee, agent, partner, director, officer, stockholder or manager has knowingly allowed or permitted any act of sexual intercourse, sodomy, oral copulation, or masturbation, to be committed in this subject picture arcade, or has knowingly permitted or allowed the subject picture arcade to be used as a place in which solicitations for sexual intercourse, sodomy, oral copulation, or masturbation openly occur.

(3) The permittee, his or her employee, agent, partner, director, officer, stockholder or manager has knowingly made any false, misleading or fraudulent statements of material fact in the application for permit, or in any report or record required to be filed

with the Board pertaining to the permit for the subject picture arcade, or has violated any rule or regulation duly adopted by the Board relating to the permit or the subject picture arcade.

(4) There has not been a responsible person on the premises to act as manager at all times during which the business was open.

(f) **Board Rules and Regulation**. The Board shall promulgate rules and regulations for the conduct of hearings for the denial or revocation of picture arcade permits which shall provide for notice of hearing and charges, the right to counsel, the right to present relevant evidence, and for the making of written findings of fact. **(Amended by Ord. No. 150,184, Eff. 11/7/77.)**

(g) **Hours of Operation**. Each picture arcade must remain closed between the hours of 2:00 A.M. and 9:00 A.M., and all customers, patrons, and visitors must be excluded therefrom between those hours. Where only one coin-operated still or motion picture machine, projector or similar contrivance is maintained and such device is not the primary business, then, if that device remains inoperative between the hours of 2:00 A.M. and 9:00 A.M., customers, patrons and visitors need not be excluded from the premises. **(Amended by Ord. No. 150,184, Eff. 11/7/77.)**

(h) **Persons Under 16. (Amended by Ord. No. 150,184, Eff. 11/7/77.)** No person under 16 years of age shall be permitted to enter or remain in a picture arcade between the hours of 10:00 P.M. and 9:00 A.M. unless:

(1) Such person is accompanied by such person's parent or guardian; or

(2) Such number of readily identifiable State licensed security guards or private security guards, as required by order of the Board of Police Commissioners, are on duty in and about the picture arcade.

(i) **Visibility of Interior.** The permittee shall not maintain any picture arcade unless the entire interior of such premises wherein the pictures are viewed is visible upon entrance to such premises. No partially or fully enclosed booths or partially or fully concealed booths shall be maintained. **(Amended by Ord. No. 150,184, Eff. 11/7/77.)**

(j) **Lighting.** A level of illumination shall be maintained in all parts of the premises which are open to the public during hours of operation in accordance with rules and regulations established by the Board. **(Amended by Ord. No. 150,184, Eff. 11/7/77.)**

* * *

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., A California Plaintiffs, vs. CITY OF LOS ANGELES, a municipal corporation, Defendant.	CASE NO. CV 95-7771 KMW (CTx) RESPONSES OF DEFENDANT CITY OF LOS ANGELES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSIONS

PROPOUNDING PARTY:
Plaintiffs Alameda Books, Inc. and Highland Books, Inc.

RESPONDING PARTY:
Defendant City of Los Angeles

SET NO.: One

Defendant CITY OF LOS ANGELES hereby responds to Plaintiffs' First Set of Request for Admissions by providing the following responses and by making the objections indicated.

* * *

REQUEST FOR ADMISSION NO. 25:

Admit or deny that you are unaware of any businesses qualifying as an "adult arcade" as defined in L.A.M.C. § 12.70 B which are not operating within a store which also constitutes an "adult bookstore" as that term is defined in that same code section.

RESPONSE TO NO. 25:

The Defendant objects to the Request on the basis that it is irrelevant, unduly burdensome, and that the information requested is not likely to lead to the discovery of admissible evidence. Further, this interrogatory would require a search of public records, a survey of buildings, and a classification of their uses which would unduly burden the City and which plaintiffs are just as able to perform as the City. Without waiving these objections, Defendant responds as follows.

Upon reasonable inquiry, the Defendant does not have sufficient information to respond to Request No. 25.

* * *

REQUEST FOR ADMISSION NO. 43:

Admit or deny that there are no "adult arcades" known to you to be currently operating in Los Angeles that do not also sell or rent videotapes and/or books and novelties.

RESPONSE TO NO. 43:

The Defendant objects to the Request on the basis that it is irrelevant, unduly burdensome, and that the information requested is not likely to lead to the discovery of admissible evidence. Further, this interrogatory would require a search of public records, a survey of buildings, and a classification of their uses which would unduly burden the City and which plaintiffs are just as able to perform as the City. Without waiving these objections, Defendant responds as follows.

Upon reasonable inquiry, the Defendant does not have sufficient information to respond to Request No. 43.

* * *

Dated: July 22, 1996

Submitted,

JAMES K. HAHN, City Attorney
CLAUDIA MCGEE HENRY,
Senior Assistant
City Attorney
SHARON SIEDORF CARDENAS
Assistant City Attorney
P. NELSON KING
Deputy City Attorney

By /s/ Sharon Siedorf Cardenas
SHARON SIEDORF CARDENAS
Assistant City Attorney

Attorneys for Defendant
CITY OF LOS ANGELES

VERIFICATION

I, SHARON SIEDORF CARDENAS, declare:

I am an Attorney at Law, duly licensed to practice my profession in the State of California. I am a Assistant City Attorney employed in the Office of the City Attorney of the City of Los Angeles and one of the attorneys assigned to represent the City of Los Angeles in the within action. My business address is 1700 City Hall East, 200 North Main Street, Los Angles, California 90012.

I prepared the foregoing RESPONSES OF DEFENDANT CITY OF LOS ANGELES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSIONS based upon information provided to me by various employees of the City of Los Angeles and others concerned with the subject mater of the within action. I am informed and believe the matters therein to be true and on that ground allege that said matters are true.

I am an agent of the City of Los Angeles and am authorized to verify the foregoing on behalf of the City of Los Angeles.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 22, 1996 at Los Angeles, California.

/s/ Sharon Siedorf Cardenas
SHARON SIEDORF CARDENAS

PROOF OF SERVICE BY MAIL

I, the undersigned, say:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action or proceeding. My business address is 1700 City Hall East, 200 North Main Street, Los Angeles, California 90012.

On July 22, 1996 I served the within:

RESPONSES OF DEFENDANT CITY OF LOS ANGELES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSIONS

the person(s) indicated below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid and addressed as follows:

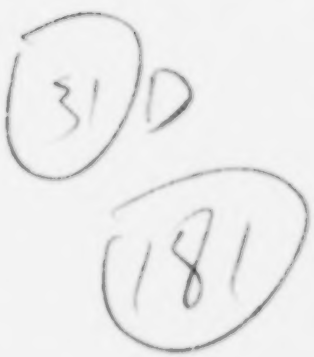
G. Randall Garrou
Weston, Sarno, Garrou & DeWitt
433 North Camden Drive, Suite 900
Beverly Hills, California 90210

On deposited such envelope(s) in the mail at Los Angeles, California. I am "readily familiar" with the office's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 22, 1996 at Los Angeles, California.

/s/ Felicia Frericks
FELICIA FRERICKS



(17)

Supreme Court, U.S.
FILED
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No. 00-799

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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1. INTRODUCTION

If one were to believe respondents and their *amici*, the First Amendment sky will immediately fall down on the City of Angels should this Court reverse the Ninth Circuit. However, as with most "the sky is falling" predictions, once the facts are separated from the panic and hyperbole, the cosmic catastrophe fails to materialize. In order to arrive at their doomsday prediction, respondents and their *amici* create the proverbial straw man stuffed with issues not before the court, evidence not in the record, and inapposite case law.

The issue in this Court is the constitutionality of one portion of the City's comprehensive zoning regulations. The trial court and court of appeals parsed the ordinance, determining the City violated the First Amendment by requiring that all adult businesses be separated from each other by 1000 feet and prohibiting more than one adult business at a location. The Ninth Circuit concluded that the City did not have sufficient evidence to justify its ordinance. In doing so, both the district court and the Ninth Circuit misapplied the First Amendment zoning jurisprudence for adult businesses enunciated by this Court in *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (*Young*) and *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (*Renton*).

2. ARGUMENT

A. This Court Has Twice Rejected the Need for Particularized Findings or Comparative Studies Regarding the Secondary Effects of Adult Entertainment Businesses.

Respondents and their *amici* loudly assert that the First Amendment requires the City to make particularized findings or produce comparative evidence of negative secondary effects in order to justify its regulation requiring 1000 feet between adult entertainment businesses, thereby prohibiting more than one adult business at a location.[1] The argument that the First Amendment requires particularized findings to justify zoning regulations on the location of adult businesses is not new. It merely recycles a similar argument raised and rejected by this Court in the past. This was, for example, specifically raised in *Young*. See, *e.g.*, Brief of Respondents, No. 75-312, at 24 ("None of the [evidence] contain any particularized showing that adult theatres and bookstores- . . . contribute in any manner whatsoever to the deterioration of surrounding neighborhoods."); and at 56 ("Detroit has failed to sustain its heavy burden of proving that [adult businesses] will, if 'clustered' with other 'regulated uses,' cause neighborhood blight and deterioration" and then "None of the [evidence] contain any particularized showing that [adult businesses] contribute in any manner whatsoever to the deterioration of surrounding neighborhoods."). This Court rejected the need for particularized findings or evidence, so long as there

[1] See, *e.g*, Brief of DKT Liberty Project, pp. 16-22; Respondents' Brief, pp. 11-12.

was a "factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect." *Young*, 427 U.S. at 71 (plurality opinion).

In another case in 1984, the Ninth Circuit held that the City of Renton failed to show a substantial governmental interest in its zoning ordinance because Renton lacked specific evidence showing that one adult theater produced any secondary effects. *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 536-537 (9th Cir. 1984). This Court specifically rejected the Ninth Circuit's reasoning because it imposed an "unnecessarily rigid burden of proof." *Renton*, 475 U.S. at 50.

Now in the present case, some sixteen years after this Court decided *Renton*, the Ninth Circuit again invalidated a portion of a zoning ordinance regulating adult businesses using the same, now discredited reasoning it applied in 1984. The Ninth Circuit's decision now before the Court simply cannot be reconciled with *Young* and *Renton*.

The argument that the City must show particularized findings or evidence flows from the incorrect assumption that a zoning ordinance regulating the location of adult businesses is a direct regulation of speech and, therefore, strict scrutiny applies.[2] However, this Court rejected

[2] This was also raised in *Young*. *See*, Brief of Respondents, No. 75-312, at 28 (The zoning ordinance here "must be analyzed as a direct abridgment of First Amendment interests.") and at 57 ("Since Detroit's classification is subject to strict judicial scrutiny, the City cannot rely on any presumption of validity, but must carry a heavy burden of justification."). It was raised again in *Renton*. *See*, Brief of Appellees, No. 84-1360, at 21 ("The test of these restrictions *must* be 'strict scrutiny.' ") (Emphasis in the original.).

strict scrutiny analysis in both *Young* and *Renton*, establishing the principle that zoning regulations of adult businesses should be evaluated using the standards set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) (*Young*, 427 U.S. at 79-82 (Powell, J., concurring) and *Renton*, 475 at 49-50) and *Clark v. Community For Creative Non-Violence*, 468 U.S. 288 (1984). *Renton*, 475 U.S. at 50.

Undeterred by precedent, respondents and their *amici* cite *United States v. Playboy Enterprises Group*, 529 U.S. 803 (2000), which concerned a challenge to a federal statute requiring cable operators to either scramble or block sexually explicit cable channels or limit access time to between 10 p.m. and 6 a.m. when children do not usually watch cable. In *Playboy*, "[t]he speech in question is defined by its content; and the statute which seeks to restrict it is content based." *Id.* at 811. Therefore, "it [could] stand only if it satisfies strict scrutiny." *Id.* at 812.

This Court in *Playboy*, however, restated the obvious and made clear that locational zoning regulations of adult businesses are subject to the more deferential standard of judicial review set out in *Young* and *Renton*. This Court specifically explained in *Playboy* that *Young* and *Renton* are "irrelevant to the question here" because the Court has "made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech." *Playboy* at 815.

B. The City May Introduce Evidence at Trial in Support of its Legislative Judgment and Is Not Limited to the Legislative History.

Respondents assert that judicial review of legislative enactments is limited to "the materials and arguments which were in fact before the City Council at the time of enactment of the challenged ordinance." Respondents' Brief at 30. Essentially, respondents' *amici* want the right to introduce evidence before this Court to challenge the City's regulation, at the same time respondents are demanding that the City be forever barred from raising a vigorous defense of the reasonableness or effectiveness of its legislative judgment by excluding any post-enactment evidence, no matter how material. As a practical matter, post-enactment evidence is far more critical in a case such as the one now before the Court where the legislative judgment is challenged some 12 or 15 years after the ordinances are enacted, then when the challenge is raised immediately after the enactment. Nonetheless, this notion of post-enactment evidence preclusion was adopted by the court of appeals. App. 15.

Notwithstanding the due process and fair trial issues associated with this one-sided approach to judicial fact finding, the precise issue of evidence preclusion in the context of adult business zoning regulations has been considered by at least three courts of appeals and all concluded that respondents' approach finds no support in the law. These decisions also make clear that this Court has never said that the government is limited only to the evidence before the legislature at the time of adoption in order to justify the challenged legislative judgment at trial.

In *Phillips v. Borough of Keyport*, 107 F.3d 164 (3rd Cir.), *cert. denied*, 522 U.S. 932 (1997), the court discussed the issue of evidence preclusion at length, carefully canvassing relevant case law. *Id.* at 178-179. The court first noted that it could "find no such rule in *Renton*, *Mitchell*,[3] or any other governing precedent." *Id.* at 178. The court then went on to say:

> "There is a significant difference between the requirement that there be a factual basis for a legislative judgment presented in court when the judgment is challenged and a requirement that such a factual basis have been submitted to the legislative body prior to the enactment of the legislative measure. We have *always* required the former; we have *never* required the latter. Whatever level of scrutiny we have applied in a given case, we have always found it acceptable for individual legislators to base their judgments on their own study of the subject matter of the legislation, their communications with constituents, and their own life experience and common sense so long as they come forward with the required showing in the courtroom once a challenge is raised." *Id.* at 178, emphasis added.

In *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000), the court first noted that "[t]he Court in *Renton* did not address this issue. . . . " 185 F.3d at 830. Then, relying on *Phillips*,

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[3] Referring to *Mitchell v. Com'n on Adult Entertainment Est.*, 10 F.3d 123, 135 (3rd Cir. 1993), which approved the use by the trial court of post-enactment evidence to show the need for the Delaware statute regulating the hours of operation of adult entertainment businesses.

supra, the *DiMa* court stated that "[w]e also agree with the district court that a municipality may make a record for summary judgment or at trial with evidence that it may not have had when it enacted its ordinance." *Id.* at 829-830. The district court, relying in part on Justice Souter's concurrence in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991), concluded that post enactment evidence of secondary effects adduced at trial is as persuasive in supporting the basis for the reasonableness of the legislative judgment as is pre-enactment evidence of secondary effects. *DiMa Corp. v. Town of Hallie*, 60 F.Supp.2d 918, 924 (W.D.Wisc. 1998).

Implicit in the notion that post-enactment evidence of need or justification is proper to sustain legislation against a constitutional challenge is the principle of legislative notice. That is, ". . . it is reasonable for local legislative bodies to take notice or assume matters of common knowledge and experience." *11126 Baltimore Blvd. v. Prince George's County, Md.*, 886 F.2d 1415, 1423 (4th Cir. 1989), *vacated on other grounds*, 496 U.S. 901 (1990). The court of appeals then went on to say:

> "As countless cases addressed by this court and courts across the nation will confirm, there are notorious and self-evident conditions attendant to the commercial exploitation of human sexuality which do not vary greatly among comparable communities within even so heterogeneous a country as our own. Thus, we are inclined to review the reasonableness of Prince George's County zoning ordinances not solely on the basis of the legislative record before it, but of what it reasonably foresaw in the light of a

sufficiently reported national experiences copiously documented in the public record." *Id.*

Therefore, in order to sustain a legislative judgment against a constitutional challenge, "a legislature is not bound to create an evidentiary record that would pass muster on plenary judicial review of legislation's necessity and fitness to achieve desired results. Judicial review goes only to whether the legislative determination of justification and fitness is not facially without factual support. . . . " *Id.* at 1424, quoting *Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165, 1169 (4th Cir. 1986). Hence, "[l]egislatures can no more be held bound not to know what the whole world knows than can courts; legislative notice of facts must be deemed to run at least as wide as does judicial notice." *Id.*, quoting *Wall Distributors*, 782 F.2d at 1169 n. 7.

Although *Renton* did not directly address the issue, it does provide support for the conclusion that it is proper for a trial court to consider post-enactment evidence which the legislature may not have had before it when the regulation was enacted. That is in fact what occurred in *Renton*. Justice Brennan dissented (475 U.S. at 58-61) because the evidence relied upon by the City of Renton at trial to establish its governmental interest in the zoning ordinance controlling the secondary effects of adult theaters was almost entirely post-enactment evidence. The Renton ordinance was amended "[s]hortly *after* [the] lawsuit commenced" to add " 'findings' concerning adult entertainment land uses that the Council purportedly relied upon in adopting the ordinance." 475 U.S. at 58-59, emphasis in the original. Justice Brennan then went on to criticize reliance on these *post-hoc* statements. *Id.* at 59-60.

Thus, fairly read, *Renton* supports the City's position that evidence need not exist at the time of enactment so long as a proper showing is made at time of trial to support the inferences and conclusions that there is a justification for a zoning ordinance regulating the location of adult entertainment businesses.

In support of its contention that *post hoc* evidence at trial is not permitted, respondents rely upon *United States v. Virginia*, 518 U.S. 515 (1996). Respondents' Brief at 29. This reliance is misplaced. *United States v. Virginia* was an equal protection challenge to a gender based classification preventing women from attending the all male Virginia Military Institute founded in 1839. *Id.* at 520. Because this was a gender based classification denying women access to a public university, VMI's proffered justification for such a classification must be "exceedingly persuasive" and the burden on the state is "demanding." *Id.* at 533. Such classifications come with a strong presumption that the classification is invalid. *Id.* at 532. Although gender is not a proscribed classification, a heightened standard of judicial review applies. *Id.* at 533.

In order to side-step the constitutional problems attendant with its gender based classification, VMI chose to leave its exclusionary policy alone and to create a new, separate program for women, the Virginia Women's Institute for Leadership (VWIL). *Id.* at 526. This practice was justified because there should be educational diversity which includes single sex institutions of higher learning; a justification which found no support in the record. *Id.* at 539. Significantly, the record was a trial record which was not limited to the historic facts of 1839, but VMI was allowed to adduce evidence of current facts which would

support its justification for its male only practices, including expert testimony on the effects of single sex educational institutions, military institutions and coeducational institutions. *See, United States v. Virginia,* 852 F.Supp. 471 (W.D.Va. 1994).

Obviously, the heightened standard of review imposed by this Court in *United States v. Virginia* is inapposite to any analysis of an adult business zoning ordinance under the more deferential standard required by *Young* and *Renton,* especially in light of *United States v. Playboy Enterprises, supra.* In any event, the City's justification for its adult business zoning ordinance was explicitly set out in the 1977 Study (JA 37-46) and in the preamble to the 1978 ordinance. App. 60-62. Similarly, the justification for amending the 1978 ordinance because of an erroneous administrative interpretation was fully set forth prior to and concurrently with the amendment. JA 29-31; App. 74-75. Thus, unlike the gender classification under review in *United States v. Virginia,* the City's justification for its zoning regulations at issue here is genuine, not hypothetical, and certainly not invented "*post hoc* in response to litigation." *United States v. Virginia,* 518 U.S. at 533.

Nor is this Court's decision in *City of Los Angeles v. Preferred Communications, Inc.,* 476 U.S. 488 (1986), "unequivocal precedent" in support of the district court's decision to limit "its review to the materials and arguments which were in fact before the City Council at the time of the enactment of the challenged ordinance." Respondents' Brief at 30. Any fair reading of *Preferred*

Communications necessarily leads to the opposite conclusion – that it is proper to present post-enactment evidence at trial in order to justify a municipality's stated interest in its regulation – because that is what this Court did.

In *Preferred Communications,* the district court dismissed the complaint on a motion to dismiss for failure to state a claim upon which relief could be granted. 476 U.S. at 490. Given this procedural posture this Court "was unwilling to decide legal questions posed by the parties without a more thoroughly developed record of proceedings in which the parties have an opportunity to prove those disputed factual assertions upon which they rely." *Id.* at 494. The case was then remanded to the district court to allow the City to file its answer and to then resolve the outstanding factual issues concerning the award of the cable franchise at issue in the case. *Id.* at 496. Fact finding was necessary to "determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard [of First Amendment judicial review] or whether those characteristics require a new analysis." *Id.* at 496, (Blackmun, J., concurring).

This Court made no judgment on the applicable standard of review or in any manner attempted to direct the district court to exclude evidence not before the City Council when the City's cable franchise was awarded. Subsequently, the City was allowed to present evidence "to prove up each of its interests" on a motion for summary judgment. *Preferred Communications v. City of Los Angeles,* 13 F.3d 1327, 1330 (9th Cir.), *cert. denied,* 512 U.S. 1235 (1994). Thus, *Preferred Communications* must be seen

as consistent with those court of appeals decisions supporting the introduction of post-enactment evidence submitted to show the reasonableness of the challenged legislative judgment.

C. The Issue of Alternate Avenues of Communication Is Not Before the Court.

Respondents take at least seven pages of their brief (at 33-39) to argue that the City's regulation prohibiting more than one adult business at a location fails to provide adequate alternative avenues of communication. Respondents comment that the City did not address this issue in its brief on the merits and they are, therefore, compelled to address this issue anticipating that the City will sandbag respondents by presenting its argument in this reply brief. (Respondents' Brief at 34.)

The City did not raise the issue of alternative avenues of communication in either its brief on the merits or in the petition for writ of certiorari for the very sound reason that the trial court's order holding that the City's regulation violated the First Amendment rendered that issue moot. App. 54. There has been no trial on this issue. No lower court has made findings of fact or conclusions of law on this issue. This Court granted certiorari on a petition that contained but one question, and it cannot be said that the issue of alternative avenues of communication is fairly included in that question.

Respondents even admit that the issue of alternative avenues of communication is not before the Court. Respondents' Brief at 47 n. 39. That admission, however, is not a concession. Rather, it is merely a segue to yet more discussion of an issue not before the Court when

the respondents implausibly assert that "there is at least a reasonable likelihood that Los Angeles' adult zoning scheme fails to provide adequate alternative sites for such businesses to allow them a 'reasonable opportunity' to relocate," relying on *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994). Respondents' Brief at 47.

In the context of this case, respondents' argument is pure balderdash for two reasons. First, at issue in *Topanga Press* was the relocation of an estimated 102 existing adult businesses made non-conforming by the City's adult entertainment ordinance, and there were only an estimated 120 potential available relocation sites at that time. 989 F.2d at 1532-1533. Because of the potential hardship that would result to the owners of the adult businesses before a trial on the merits, the issuance of a preliminary injunction to prevent enforcement of the ordinance was proper.[4] *Id.* at 1534. Here, respondents' businesses are not pre-existing. They commenced operations well after the enactment of the multi-use prohibition and in open disregard of the City's regulation. JA 22.

Second, respondents here need find only two sites, not 102 as in *Topanga Press*. Each initially opened as a single adult business in conformity with the City's adult business zoning ordinance. JA 20. It was only later that they added a second business in open violation of the

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[4] The *Topanga Press* litigation was ultimately settled by the entry of a stipulated permanent injunction whereby the City would not enforce certain provisions of its adult business zoning ordinance against the nonconforming businesses. JA 257-258.

City's zoning ordinance, and it is only those two businesses which need another site. Thus, if this Court is being asked to make a finding on a moot issue based upon virtually non-existent facts whether there is a reasonable likelihood that respondents can find two sites in the vast expanse of the City of Los Angeles, it would have to be "yes."

D. The *Amici* Brief of the American Booksellers Foundation Addresses Issues Not Before the Court.

The brief of respondents' *amici*, the American Booksellers Foundation for Free Expression, et al., is premised on inapposite facts and simply does not address the issues in this case. The Booksellers are heard to complain that "adult use regulations [are applied] to mainstream bookstores and video stores" (at 3, internal quotes omitted) and that over time municipalities have expanded their definitions of adult businesses to unfairly characterize mainstream businesses as "adult." *Id.* at 4-5. This supposed "creeping expansion" of adult uses has been occurring over the last 15 years. *Id.* at pp. 6-7. There is, however, no issue of changing definitions or creeping expansion of adult uses here since the City's definitions of adult businesses, all of them, were first enacted in 1978 (App. 60-69) and have remained unchanged since. Further, there is no issue that a "mainstream" bookstore or video arcade has been unfairly trapped by the City's definitions because respondents readily concede that they are adult businesses within the meaning of these now 23 year old definitions.

By conjuring up an irrational legislative future, nothing is added to the legal analysis which this Court requires to resolve the substantial legal issues before it.

E. The Brief and Lodged Reports of the First Amendment Lawyers Association Is Entirely Outside the Record and Should Be Stricken.

The First Amendment Lawyers Association has improperly lodged with the Court a very large compilation of various reports which purport to show that "older" studies demonstrating the existence of negative secondary effects from adult businesses, including the City's 1977 Study, are scientifically invalid.[5] Brief of First Amendment Lawyers at 21, *et seq.* One of the reports, undated, was specifically prepared to attack the 1977 Study in this Court. *Id.* at 20 and App. 1-42. By extension, then, this Court is asked to presume that the legislative judgment which led to the City's 1978 zoning ordinance regulating adult businesses was based on a false premise and, therefore, the City's ordinance was constitutionally infirm *ab initio*.

The City, or one of its *amici*, could easily counter with its own, equally voluminous, lodging of reports and specially prepared papers proving the existence of negative secondary effects or attacking various studies relied upon by respondents and their *amici*. The City could download

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[5] The First Amendment Lawyers do not request the Court to take judicial notice of these reports. It is doubtful whether the Federal Rules of Evidence permits any court to take judicial notice of the contents of contested reports. See, *e.g.*, *Carley v. Wheeled Coach*, 991 F.2d 1117, 1126 (3rd Cir.), *cert. denied*, 510 U.S. 868 (1993).

and submit to the Court the contents of a web site containing thousands of pages establishing the negative impacts of adult businesses[6] or provide more than a few string cites showing the existence of negative secondary effects. Happily, the City will not do so.

One case, however, is particularly relevant here, *Stringfellow's of New York, Ltd. v. City of New York*, 91 N.Y.2d 382, 694 N.E.2d 407, 671 N.Y.S.2d 406 (1998), *cert. denied sub nom. Amsterdam Video v. City of New York*, 525 U.S. 1067 (1999). The court in *Stringfellow's* discusses with approval the comprehensive undertaking by the City of New York in documenting the negative effects on the quality of urban life resulting from the clustering of adult businesses, not only in that City, but also as a problem of national significance.[7] New York's reliance on studies outside New York was "well placed" and it also relied on its "own detailed study." *Buzzetti v. City of New York*, 140 F.3d 134, 140 (2nd Cir.), *cert. denied*, 525 U.S. 924 (1998).

Stringfellow's shows that, notwithstanding the telephone book size submission of the First Amendment Lawyers, the central issue of whether adult businesses

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[6] See, www.communitydefense.org.

[7] The reason adult businesses cluster was explained to this Court in *Young*. "Moreover, to whatever extent adult theatres and bookstores do tend to locate close to one another, they do so presumably because a larger market of consumers thus becomes available. If it is true that the consumer of sexually oriented reading and viewing material prefers to shop in an area where several outlets are available, the restriction contained in the ordinances impose an economic disadvantage on the proprietors of adult theatres and bookstores as well as a burden upon the consuming public." Brief of Respondents, No. 75-312, at 75.

can cause negative secondary effects which was first documented in *Young*, and then in *Renton*, remains as much a current problem for municipalities large and small, as it was in the late 1970's for the City of Los Angeles. Nothing lodged by the First Amendment Lawyers undermines the constitutional principle that municipalities can regulate the well documented adverse negative effects through their zoning regulations.

Given the on-going debate, the inability of these reports to cast a legitimate doubt on the City's legislative judgment is self evident, and the Court should conclude as did one of *respondents' amici*, DKT Liberty Project that:

> "Our point is not that these studies could never support a city ordinance limiting the location of adult businesses. Rather, the studies themselves demonstrate that there is substantial evidence on both sides of the issue." Brief of DKT Liberty Project at 13.

F. There Is No Issue Before the Court That the City's Regulation Is Pretextual.

Respondents repeatedly suggest that the City's regulation is a pretextual attempt to somehow censor or ban adult video stores. *See, e.g.*, Respondents' Brief at 10-11, 14-16, 29-30, 32,[8] and 44.[9] Such insinuations, however, are

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[8] Where it is explicitly stated that the City's regulation is "blatantly pretextual legislation."

[9] Here, respondents assert that "in 1983, as a pretextual way of eliminating the medium of video previewing booths, the City presumed to define a new type of independent business (which had never before existed), calling it an 'adult

not supported by any evidence in the record. Neither the trial court nor the court of appeals characterized the City's regulation as pretextual. Neither court rendered any finding of fact on that issue.

By its own terms, the City's regulation prohibiting more than one adult business at a location is not pretextual as to adult video arcades because it applies to all combinations of adult businesses, not just bookstore/video arcade combinations. App. 71 ("no person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof. . . . "). Moreover, factually, respondents' thesis is disproved since Highland Books, one of the two respondents in this case, opened as an adult video arcade in 1987 in compliance with the City's adult zoning ordinance. JA 20.

CONCLUSION

Twenty-five years ago this Court in *Young* upheld the need to protect the quality of urban life and residential neighborhoods from the proven negative secondary effects of adult businesses. These were substantial governmental interests, and, therefore, "it is undeniable that

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arcade'. . . . " However, they have their facts wrong. The City "presumed" to define an adult arcade in 1978 at the same time it defined the other adult businesses regulated by the City's Ordinance, including adult bookstores. App. 62. These definitions have not been amended since and respondents have not sought to directly challenge the validity of these definitions in this lawsuit.

zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local governments, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.' " *Young*, 427 U.S. at 80 (Powell, J., concurring, quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974).). Fifteen years ago, in *Renton*, this Court reaffirmed the importance of the governmental interests identified in *Young* and rejected the argument that the First Amendment required irrefutable proof of secondary effects before a municipality could enact a zoning ordinance regulating the location of adult businesses.

The Ninth Circuit decision, in reasoning and result, is inconsistent with *Young* and *Renton*. The briefs of respondents and their *amici* provide no basis to affirm the decision of the Ninth Circuit. They merely revisit arguments raised and rejected by this Court, first in *Young* and then in *Renton*. Because there is nothing new under the First Amendment sky over the City of Angels, the judgment of the Ninth Circuit should be reversed because it is in direct conflict with this Court's precedent.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 5 2001
CLERK

No. 00-799

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

vs.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE 118 CALIFORNIA CITIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTION PRESENTED

Must cities have specific evidence of the harmful secondary effects of a particular type of adult business or combination of adult businesses, before cities may enact regulations to address the harmful impacts of that particular type of business or combination of adult businesses?

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INTEREST OF AMICI CURIAE

The 118 California Cities listed in the attached Appendix (hereinafter "California Cities") have a vital interest in the regulation of adult businesses to prevent the harmful secondary effects caused by such establishments on their residential neighborhoods, commercial businesses and industries. The decision in *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000) ("*Alameda Books*"), threatens the California Cities' ability to adopt and enforce their regulations because it requires that cities document and produce particularized evidence to support each aspect of a multi-faceted regulatory program. Moreover, the *Alameda Books* decision establishes an evidentiary standard for adult business regulation that is unreasonably stringent, prohibitively expensive to implement, and contrary to this Court's prior pronouncements on this issue. The level of scrutiny applied in *Alameda Books* by the Ninth Circuit will significantly alter the current balance between opportunities for adult expression and municipal efforts to ameliorate inevitable harmful secondary effects.

In sum, amici California Cities have a strong interest in and are directly affected by the decision below. They respectfully submit this Amicus Brief in Support of the City of Los Angeles' Petition for Writ of Certiorari.[1]

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[1] This Petition of Amici Curiae in Support of this Petition is timely filed pursuant to Rule 37.2 of the Rules of this Court. Pursuant to Rule 37.4 of the Rules of this Court, this Petition is presented on behalf of the 118 California Cities listed in the attached Appendix and has been authorized by the law officer of each city.

STATEMENT OF THE CASE

In *Alameda Books, Inc. v. City of Los Angeles*, the Ninth Circuit Court of Appeal, in an opinion by Judge Hawkins, struck down a reasonable attempt by the City of Los Angeles ("City") to address what the City believed to be deleterious impacts of locating two adult businesses in the same building. *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000). The Ninth Circuit found that this "multi-use" prohibition was invalid because the City did not establish a substantial interest in its enactment.[2] Adoption of the multi-use prohibition was based on the City's own 1977 study (the "1977 Study") documenting the fact that the concentration of adult entertainment businesses results in increased crime, decreased property values, and generally causes blight and other negative impacts in the neighborhoods in which they are concentrated. The 1977 Study found that fully one-fourth of the adult businesses that experienced

[2] As described in the City of Los Angeles' Petition for Writ of Certiorari, the "multi-use" prohibition provides as follows: ANo person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an adult entertainment business within 1,000 feet of another adult entertainment business or within 500 feet of any religious institution, school or public park within the City of Los Angeles. No person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof, or the increase of floor area of any adult entertainment business in any building, structure or portion thereof containing another adult business." See Brief of Petitioner at 7.

the greatest increases in crime were adult bookstores and arcades.[3]

At the time the City Council adopted the multi-use prohibition, the City Council was aware of the decision in *Hart Bookstores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980) (*Hart*) where the court relied on the City of Los Angeles' 1977 Study to

[3] The 1977 Study upon which the City relied incorporated a crime report for the Hollywood area compiled by the Los Angeles Police Department entitled, "The Impact of Sex Oriented Businesses on the Police Problem in the City of Los Angeles." [Tab 7, pp. 575-576; 658.] (Citations are to Appellant's Excerpt of Record, filed with the Ninth Circuit Court of Appeals.) The Crime Report compared the crime rate for the Hollywood area to the crime rate citywide between 1969 and 1975, during which adult businesses had the greatest proliferation in the Hollywood area. [Tab 7, pp. 665-667.] The Study noted that one-fourth (24 of 99) of the adult entertainment businesses existing in the Police Department West Bureau, including Hollywood, in 1976, were classified as "Bookstores/ Arcades." [Tab 6, p. 422.] The Crime Report determined that there was an overwhelming increase in crime for the Hollywood area as compared to citywide and at the same time deployment of police personnel in the Hollywood area proportionately increased. The Crime Report noted that:

> "The overwhelming increase in prostitution, robberies, assaults, thefts, and the proportionate growth in police personnel deployed throughout Hollywood, are all representative of the blighting results that the clustering of Adult Entertainment Establishments has on the entire community. These adverse social effects not only infect the environs immediately adjacent to the parlors but create a malignant atmosphere in which crime spreads to epidemic proportions." [Tab. 7, p. 667.]

uphold a multi-use prohibition very similar to the one enacted by the City of Los Angeles. *Hart* at 823.

After the multi-use prohibition was enacted, plaintiffs expanded their adult bookstores to include adult video arcades. When the City sought to enforce the multi-use prohibition, the plaintiffs filed suit in federal court seeking declaratory and injunctive relief to have the multi-use prohibition declared unconstitutional and its enforcement enjoined. The trial court granted plaintiffs' motion for summary judgment and held that the multi-use prohibition prohibiting an adult bookstore and adult video arcade in one building violated the First Amendment.

The Ninth Circuit affirmed, finding that the multi-use prohibition did not serve a "substantial governmental interest." *Alameda Books* at 724. In the court's view, Los Angeles did not have, in the pre-enactment legislative record, specific evidence to prove that the specific combination of bookstores and video arcades would produce harmful secondary effects:

> " . . . [The] Study was not directed at determining the impact of individual adult entertainment business units. Rather, its purpose was to ascertain the impact of a concentration of such business units in small geographic areas. Therefore, by categorizing certain businesses as 'bookstore/arcades', the Study determined not what the impact of a 'bookstore/arcade' was on the surrounding area, but the impact of a 'bookstore/arcade' as an individual business entity that was part of a concentration consisting of multiple adult business establishments. *As such, the Study did not identify any harmful secondary*

> *effects resulting from a 'bookstore/ arcade' combination as individual business units."* (Emphasis added.) *Alameda Books* at 724.
>
> *" . . . Los Angeles has presented no evidence that a combination adult bookstore/arcade produces any of the harmful secondary effects identified in the [1977] study.* As the above discussion indicates, the evidence the city has 'relied' upon – the 1977 Study – contains no findings that an individual combination bookstore/arcade produces any of the increased crime the study found resulting from a concentration of adult businesses. Therefore, it is unreasonable for the City to infer that absent its regulations, a bookstore/arcade combination would have harmful secondary effects." (Emphasis added.) *Id.* at 725.

On November 17, 2000, Petitioner, City of Los Angeles, filed its Petition for Writ of Certiorari with this Court.

ARGUMENT

The California Cities incorporate herein the "Reasons For Granting Writ" contained in the City of Los Angeles' Petition for Writ of Certiorari. Briefly, the *Alameda Books* decision is inconsistent with prior decisions of this Court and with decisions of five Circuit Courts of Appeal. If allowed to stand, the decision will significantly hinder the ability of local governments to effectively regulate adult businesses.

SUMMARY OF ARGUMENT

The purpose of the First Amendment is to protect free expression and promote the dissemination of thoughts and ideas. There is no danger that the messages conveyed by adult businesses will be regulated into oblivion. Notwithstanding decades of judicial decisions that have supported local governments' efforts to regulate harmful secondary effects, the adult entertainment industry continues to thrive and expand. Moreover, the Internet has added a new dimension to the dissemination of adult-oriented speech. Adult-oriented speech is not an endangered form of expression.

The *Alameda Books* decision requires that a city present particularized evidence that a particular combination of adult businesses actually produce the secondary effects that a City seeks to ameliorate. This requirement significantly endangers the ability of local governments to reasonably experiment with regulatory solutions to admittedly serious problems. Cities simply do not have the statistical tools or the financial resources to develop evidence of sufficient specificity to meet the burden established in *Alameda Books* for every regulatory aspect of their adult business ordinances.

Neither the decisions of this Court, nor the decisions of other Circuit Courts of Appeal, have imposed such an insurmountable burden. In fact, these decisions have consistently held that local governments may rely on their own studies, or studies of other jurisdictions, to document the harmful secondary effects of adult businesses, so long as they believe that the evidence in the studies is relevant to the problems they address. That standard has

resulted in a reasonable balance between regulation of adult-oriented speech and free expression that would be destroyed by *Alameda Books*.

REASONS WHY CERTIORARI SHOULD BE GRANTED

A. The Evidentiary Standard Established By The Ninth Circuit For Land Use Studies Would Impose Impossible Burdens On Attempts By Local Jurisdictions To Address The Harmful Secondary Effects Caused By Adult Businesses.

It is conceded that the 1977 Study did not include specific evidence that adult bookstores/arcades located in the same building produce specific harmful secondary effects. However, the 1977 Study did document (as have numerous other studies) that the concentration of adult entertainment businesses results in increased crime, decreased property values, and generally causes blight and other negative impacts in the neighborhoods in which they are located. Based on this general evidence of harmful secondary effects, the fact that adult bookstores/arcades constituted 25% of the adult establishments in areas identified as heavily impacted by harmful secondary effects, and the *Hart* decision, the City reasonably concluded that the combination of two adult businesses in the same building likely contributes to similar blighting conditions and adverse secondary effects.

Given this reasonable conclusion, the City reasonably experimented with a solution that it believed would be successful. It required that different types of adult uses, including adult bookstores and adult video arcades, not

be combined under a single roof. This requirement is a logical extension of the common requirement that adult uses under different ownership be geographically dispersed. Moreover, both requirements are based on the reasonable conclusion that a concentration of adult uses, be they of the same or different ownership, exacerbate the inevitable harmful secondary effects.

If, as *Alameda Books* suggests, general evidence of the harmful effects of a concentration of adult uses is insufficient to justify a regulation requiring dispersal, local jurisdictions will have an exceedingly difficult time enforcing their current adult business regulations or adopting new ones.

The ever-lengthening list of variations of adult businesses attests to the breadth and variability of this industry. New variations constantly appear in attempts to expand markets and circumvent existing regulations. The complexity of the ordinances regulating these uses has necessarily grown in an attempt to keep pace with the ever-changing adult business industry and evolving judicial standards. Current adult business ordinances often measure in excess of 30 pages and contain dozens of regulatory provisions.

The Los Angeles ordinance is a typical example. The ordinance defines eight types of adult businesses: adult arcades, adult bookstores, adult cabarets, adult motels, adult motion picture theaters, adult theaters, and sexual encounter establishments. See Petition for Writ of Certiorari filed by Petitioner, City of Los Angeles, Appendix pp. 62-65. *Alameda Books* suggests that the City must identify harmful secondary effects resulting from each

type of business as an individual business entity, before that business may be regulated. Even if local jurisdictions had the funds to do so, available statistical and evidentiary tools are not refined or sophisticated enough to produce that level of evidence in a cost-effective manner. Moreover, crime statistics and diminution of property values are difficult to correlate to particular business practices. Land use studies to date are focused on correlating harmful secondary effects of concentrations of adult businesses over large geographic areas and not focused on specific harmful effects caused by individual adult businesses or operating components of that adult business.

The Los Angeles ordinance prohibits adult businesses from locating within 500 feet of sensitive uses such as religious institutions, schools and public parks. Based on the logic employed by the Ninth Circuit in *Alameda Books*, Los Angeles would need to show that each type of business, or each business component, individually, would produce harmful secondary effects before they could be prohibited from locating next to such sensitive uses. Presumably, regulations concerning hours of operation, dress standards for dancers, etc., would also be required to meet the same stringent evidential standard requiring specific documentation of harmful secondary effects before a city can impose them. New forms of adult businesses would be impossible to regulate until the jurisdiction had exposed itself to sufficient harmful effects for a sufficient length of time to amass sufficient evidence detectable by statistical methods to meet the standard set forth in *Alameda Books*.

The California Cities believe that the following hypothetical aptly demonstrates the difficult and unworkable burdens *Alameda Books* will impose on local jurisdictions.[4] Imagine that entrepreneurs have recently requested permits to operate adult use car washes, either as special events or permanent car wash uses. The car washes typically include an "adult carwash" performed by topless or nude valets, a dunk tank of valets in which the dunk contestants are clad in skimpy T-shirts, and the sale of adult merchandise on the premises of the car wash. The advertising for the new car wash also touts the permissive use of video and still cameras, presumably to capture the adult use activities. The introduction of adult business activities in an otherwise conventional car wash is novel enough not to be addressed in existing secondary effect studies or adult business ordinances. Thus, should a city wish to address the attendant impacts of such an event, under the Ninth Circuit's newly-adopted standards, a city must not only study the obvious impacts such a use will have on surrounding residences and businesses, the study must also include an analysis of each operating component – the car wash, dunk tank, sale of merchandise and video/still photography – in order to permit reasonable regulations of this use. Since this is a novel adult business use and no other jurisdiction has an operating adult car wash, the Ninth Circuit's evidentiary standard for regulating this use becomes unworkable and unnecessarily harsh.

---

[4] While this narrative is termed a "hypothetical," the California Cities note that it is based on actual inquiries made by car wash operators in southern California for a determination of use.

Putting aside the practical difficulties in finding and documenting the adverse impacts of each component of this use, any city faced with imposing regulations on this car wash will also be considerably constrained by the costs attendant in conducting and/or commissioning the numerous secondary effects studies now required by the Ninth Circuit's *Alameda Books* decision. At a time when land use study costs can range anywhere from $3,000, for the most elementary study, to over $100,000 for studies with complicated statistical analyses, even the richest cities will be hard pressed to pay for secondary effect studies needed to document every manifestation or operating component of an adult business use. When the administrative burdens imposed by the Ninth Circuit's evidentiary standard for land use studies are coupled with the fiscal impacts of those burdens, *Alameda Books* spells the death knell of new regulatory approaches that are responsive to the impacts produced by novel adult businesses.

B. This Court Has Not Required That Adult Business Regulations Be Supported By Particularized Evidence In The Legislative Record.

This Court has repeatedly rejected the approach taken in *Alameda Books*. Previous decisions have accorded local governments considerable discretion in justifying their attempts to ameliorate harmful secondary effects, by routinely deferring to the reasonableness of legislative judgements in crafting regulatory solutions to the serious problems posed by adult uses.

In *City of Renton v. Time Playtime Theaters*, 475 U.S. 41 (1986) (*Renton*), this Court considered a dispersal ordinance enacted by the City of Renton, Washington. The Ninth Circuit had struck down Renton's zoning ordinance because it was enacted without the benefit of studies specifically relating to "the particular problems or needs of Renton." *Renton* at 50. The Supreme Court upheld the Renton ordinance, holding that requiring evidence of particular problems in Renton was an "unnecessarily rigid burden of proof." The Court noted:

> "The first amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as *whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.*" (Emphasis added.) *Renton* at 51-52.

Moreover, the Court stressed that cities "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." (Emphasis added.) *Renton* at 52; *citing, Young v. American Mini Theaters*, 427 U.S. 50, 71 (1976).

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (*FW/PBS*), the City of Dallas adopted a comprehensive ordinance regulating adult businesses, including adult motels. The term "adult motel" was defined to include a motel offering a room for rent for a period of less than ten hours. Petitioners challenged the ordinance, in part, on grounds that the City of Dallas did not have a sufficient factual basis upon which to conclude that the rental of motel rooms for fewer than ten hours produced adverse

impacts. The Dallas City Council had before it only the City of Los Angeles' 1977 Study that considered generally the effects of adult motels on surrounding neighborhoods. *FW/PBS* at 236. The Supreme Court upheld the provision:

> "The court of appeals thought it *reasonable to believe* that shorter rental time periods *indicate* that the motels foster prostitution and that this type of criminal activity is what the ordinance seeks to suppress. [Citation omitted] *Therefore, no more extensive studies were required than those already available.* We agree with the court of appeals that the *reasonableness of the legislative judgment*, combined with the Los Angeles study, is adequate to support the City's determination that motels permitting room rentals for fewer than 10 hours should be included within the licensing scheme." (Emphasis added.) *FW/PBS* at 236.

Likewise, in *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991) (*Barnes*), this Court upheld an Indiana statute prohibiting public nudity as applied to nude erotic dancing, notwithstanding that the legislative record was devoid of any evidence regarding the legislature's intent or the negative secondary effects of such activity. No single opinion commanded the votes of a majority of the court. The opinion of Chief Justice Rehnquist, writing for Justices O'Connor and Kennedy, noted that "[i]t is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislature had in mind." *Barnes* at 567-568. The opinion nevertheless concluded that "the statute's purpose of protecting societal order and morality is clear," and that

such a purpose furthered a substantial governmental interest. *Barnes* at 568.

Justice Souter, who wrote separately in *Barnes* to uphold the statute, noted:[5]

> "In *Renton v. Playtime Theatres, Inc.* [citations omitted], we upheld a city's zoning ordinance designed to prevent the occurrence of harmful secondary effects, including crime associated with adult entertainment, by protecting approximately 95% of the city's area from the placement of motion picture theaters emphasizing ' "matter depicting, describing or relating to 'specified sexual activities' . . . for observation by patrons therein." ' [citations omitted] Of particular importance to the present inquiry, we held that the City of Renton was not compelled to justify its restrictions by studies specifically relating to the problems that would be caused by adult theaters in that city. Rather, 'Renton was entitled to rely on the experiences of Seattle and other cities' [citations omitted], which demonstrated the harmful secondary effects correlated with the presence 'of even one [adult] theater in a given neighborhood.' [citations omitted]
>
> The type of entertainment respondents seek to provide is plainly of the same character as that at issue in *Renton, American Mini Theatres,* and *LaRue. It therefore is no leap to say that live nude dancing of the sort at issue here is likely to*

[5] The Fifth, Sixth and Eleventh Circuits have concluded that the reasoning of Justice Souter's opinion is controlling as it was the narrowest of the opinions in the *Barnes* majority. *J & B Entertainment, Inc. v. City of Jackson,* 152 F.3d 362, 370 (5th Cir. 1998).

> *produce the same pernicious secondary effects as the adult films displaying 'specified anatomical areas' at issue in Renton. . . . "* (Emphasis added.) *Barnes* at 583-584.[6]

In *City of Erie v. Pap's A. M.,* 529 U.S. 277 (2000) (*Erie*), the most recent decision in which this Court examined the evidentiary standard necessary to support adult business regulations, this Court reaffirmed the *Barnes* standard in upholding a ban on nude dancing. The plurality concluded, as did Justice Souter in *Barnes,* that general evidence of the harmful secondary effects of adult businesses was sufficient to justify regulation of adult activities of a similar character:

> " . . . [I]n terms of demonstrating that such secondary effects pose a threat, the city need not 'conduct new studies that produce evidence independent of that already generated by other cities' that demonstrate the problem of secondary effects, 'so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.' " [Citation omitted]
>
> "Because the nude dancing at [Pap's] Kandyland is of the same character as the adult entertainment at issue in *Renton, Young v. American Mini Theaters, Inc.,* [citations omitted], and *California v. LaRue* [citations omitted], it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects, and Erie could reasonably rely on

[6] The California Cities recognize that Justice Souter later disclaimed his concurrence in *Barnes* in his concurring and dissenting opinion in *Erie*. See *Erie* at 294.

> the evidentiary foundation set forth in *Renton* and *American Mini Theaters* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. . . . Even in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdiction is relevant to the problem it is addressing." (Emphasis added.) *Erie* at 283.

The plurality explicitly rejected Justice Souter's suggestion that the City of Erie be required "to develop a specific evidentiary record supporting its ordinance." *Erie* at 284.

By requiring that Los Angeles produce studies that specifically identify harmful secondary effects resulting from a specific adult business or combination of adult businesses, the Ninth Circuit has imposed a burden similar to that suggested by Justice Souter, but rejected by this Court in *Erie*. The California Cities respectfully request that the *Alameda Books* decision also be rejected for the reasons set forth in the *Renton, Barnes* and *Erie* decisions of this Court.

C. CONCLUSION

The widespread application of the *Alameda Books* standard would spell the death knell of effective regulation of adult-oriented businesses. Local jurisdictions simply do not have the financial ability or the statistical tools to produce the particularized evidence necessary to meet the *Alameda Books* standard for each manifestation or

combination of adult use activities within their jurisdiction.

This Court has consistently articulated a much more reasonable standard. This standard provides that cities may rely on general evidence of the harmful secondary effects to justify reasonable regulations. The application of that standard has resulted in a reasonable balance between the need to regulate businesses that produce harmful secondary impacts and the protection of constitutionally-protected speech. In the 20 years that the *Renton, Barnes* and *Erie* standard has been applied, adult businesses have not been regulated into oblivion. To the contrary, they have flourished in ever-changing forms. At the same time, communities across the United States have, for the most part, been largely successful in ameliorating the pernicious secondary effects caused by those businesses.

The California Cities respectfully request that this Court reaffirm the *Renton, Barnes* and *Erie* standard to enable the California Cities to continue to adopt and enforce effective regulatory mechanisms to meet the

challenges of ameliorating the harmful secondary effects of adult businesses.

Dated: January 5, 2001

Respectfully Submitted,

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APPENDIX 1

LIST OF PARTICIPANTS IN AMICUS BRIEF

in

CITY OF LOS ANGELES

v.

ALAMEDA BOOKS, INC., et al,

In Support of City of Los Angeles' Petition for Writ of Certiorari to the Supreme Court of the United States

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Supreme Court, U.S.
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No. 00-799

IN THE

Supreme Court of the United States

CITY OF LOS ANGELES,
Petitioners,

v.

ALAMEDA BOOKS, INC., a California corporation,
HIGHLAND BOOKS, INC., a California corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF CAPITOL RESOURCE INSTITUTE & CAMPAIGN FOR CALIFORNIA FAMILIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

CITY OF LOS ANGELES,
Petitioners,

v.

ALAMEDA BOOKS, INC., a California corporation,
HIGHLAND BOOKS, INC., a California corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF CAPITOL RESOURCE INSTITUTE & CAMPAIGN FOR CALIFORNIA FAMILIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*[*]

Capitol Resource Institute ("CRI") is a nonprofit organization that develops positive policies that affect culture and government in the State of California. CRI advocates on issues that affect California's families. They further provide a variety of services and products that educate the public on legislation and governmental policy. CRI provides commentary to more than 30 radio stations in California and offers

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[*] This brief was not authored in whole or in part by counsel for either party. No person or entity, other than the *amicus curiae* or its members, made a monetary contribution to the preparation or submission of this brief. Written consent to the filing of this brief had been granted by counsel for Petitioners and Respondents in this case. Such written consent of all parties has been lodged with the Clerk of this Court.

expert analyses and commentary on key issues of public policy in the State of California.

Campaign for California Families ("CCF") is a nonprofit, nonpartisan family defense and lobbying organization serving families in the State of California and across the nation. CCF promotes the innate worth of all individuals, but advocates against behavioral choices that are detrimental to society, family and the general welfare of the individual states and the nation as a whole.

SUMMARY OF ARGUMENT

Municipalities and adult business owners are mutually entitled to know where the objective bounds of the First Amendment lay. Fortunately, bounds relevant to the present issues have been definitively established by this Court. Homage to the First Amendment gains nothing by requiring that an agency conduct evidentiary studies on negative secondary effects each time it wishes to enforce a regulation against an adult business. Content-neutral regulations can rely on existing data and prior judicial precedent demonstrating or acknowledging the existence of negative secondary effects. To wit, *Renton v. Playtime Theaters, Inc.* (1986) 475 U.S. 41 and *United States v. O'Brien* (1968) 391 U.S. 367 serve as reliable bellwethers for determination of Constitutional soundness in such matters.

Los Angeles Municipal Code § 12.70 is a content-neutral restriction on conduct. Contrary to the position of Alameda Books and Highland Books, the regulations present no significant impact on free expression under the First Amendment. Thus, the only appropriate standard of review for such an ordinance is the standard of review suggested by this Honorable Court in *O'Brien, Id.* Application of the *O'Brien* standard to this case nets only one conclusion. The ordinance withstands constitutional scrutiny.

I. THE LOS ANGELES RESTRICTIONS DO NOT STRIKE A BLOW TO THE FREE MARKET-PLACE OF IDEAS: THUS, A LOWER STANDARD OF REVIEW IS APPROPRIATE

This case does not present with any violation of fundamental rights. The First Amendment is a manifestation of the inherent right of Man to seek truth. It is premised on the notion that, "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good is better reached by the free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be safely carried out." *Abrams v. United States* (1919) 250 U.S. 616, 630 (Holmes, J., dissenting).

"A remark attributed to Voltaire characterizes our zealous adherence to the principle that the government may not tell the citizen what he may or may not say. Referring to a suggestion that the violent overthrow of tyranny might be legitimate, he said: "I disapprove of what you say, but I will defend to the death your right to say it." . . .

[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment." *Young v. American Mini Theaters* (1976) 427 U.S. 50, at 63-64.

Importantly, this Court has never stated that there is a First Amendment right to operate adult video viewing booths which a city believes to be in violation of time, place and manner restrictions. Whilst it may be true that the First Amendment graciously affords rights to peaceful assembly

and to express oneself through erotic messages, there is no tenable claim for First Amendment protection in the conduct of viewing of others engaged in sex, on videotape, in a commercial setting. In the view of *amicus curiae*, this Court has recognized that the adult film business may already exist at the outer fringes of the First Amendment.

In *Young v. American Mini Theaters*, *Id.* at 427 U.S. 61, Justice Stevens, writing for a plurality of this Court, stated that, "[t]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . ."

It seems very difficult to believe that the Founding Fathers found themselves in the position of speculating about whether or not video peepshow booths would be in need of the sacrosanct security provided by the Constitution. There is simply no identifiable right to be had in the commercial viewing of pornography within the confines of a business that the government already has a right to impose time, place and manner regulations on.

A. Given the Modern Availability of Pornographic Materials, Adult "Video Arcade" Businesses Have Little or No Protection Under the First Amendment

As recognized in *American Mini Theaters*, *Id.* at 63, "[A]part from the fact that the ordinances treat adult theaters differently from other theaters and the fact that the classification is predicated on the content of the material shown in the respective theaters, the regulation of the place where such films may be exhibited does not offend the First Amendment." Adult video arcades should not be treated differently than adult movie theaters.

It makes no sense to question a municipality's determination that the "bookstore" and "arcade" areas of an

adult business are "separate businesses" for purposes of zoning requirements. This is nothing other than a classification of the physical characteristics of a business. Ultimately, the classification only affects the place in which such a commercial venture may be carried out.

Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49 speaks wisely to the issues at bar. It stands for the proposition that nothing in the body of Constitutional case law seems to suggest that one has a First Amendment right to view pornography in places of public accommodation. As set forth below, the viewing of adult materials can be done in one's home. This truth is even more obvious than it was in 1973.

The proliferation and accessibility of VCRs, camcorders, and a whole host of other technological advances have allowed individuals to partake of the outer fringes of the First Amendment without having to bring what might be rightfully deemed 'indecency' into the public domain. Given the creation of these many alternative avenues of communication, there is no harm in allowing a city to exercise broad control over its land use policies, even if there is an incidental effect on purveyors of pornography.

It only follows that the restrictions and classifications of adult video "arcades" do not rise to the level of an attack on the First Amendment right to "control of reason and the intellect." *Paris* at 93 S.Ct. 2640. While it is true that there is a private right to view and possess pornographic materials, it is not true that one can engage in such conduct wherever and whenever one sees fit. *See generally, Stanley v. Georgia* (1969) 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542.

II. THE DETERMINATION OF "SECONDARY EFFECTS" SHOULD BE A QUESTION OF LAW

Necessarily, this Court defines the boundaries to which fundamental rights may be extended and it is the charge of this Court to declare what the state of law is. *See generally, Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137. To the

extent that this Court, as a final arbiter, may speak to our nation, it is also true that the nation and its cities may rely on preordained conceptions of what constitute acceptable restrictions on rights.

It is undeniable that "[t]he States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger public safety, or to jeopardize the States right to maintain a decent society." *Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49, 68. It is further acknowledged that, "A commercial theater cannot be equated with a private home." *Id.* at 50.

Implicit in the above statement is the Constitutional inference that a State need not prove to a jury that every act of commercial distribution and exhibition of pornographic materials is offensive to the First Amendment. In fact, in assessing potentially "obscene" materials, this Court found that it was not "error to fail to require "expert" affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence. [cites]." *Paris* at 56.

Much in the same way that pornographic materials "are sufficient in themselves" for determinations as a matter of law on "obscenity," it makes sense that adult businesses speak for themselves as to the finding of secondary effects. The power to make a neutral judgment regarding the time, place and manner in which such materials can be placed on exhibit is well within the province of the Courts. *Renton* at 475 U.S. 47. Therefore, where a State's determination as to secondary effects relies on "various unprovable assumptions," there is no offense to the Constitution. "Such assumptions underlie much lawful state regulation of commercial and business affairs [cites]." *Paris* at 61-62.

As a matter of States' rights, it is already established that there is an "interest of the public in the quality of life and the

total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." *Paris* at 58. Indeed, there is a "right of the Nation and of the States to maintain a decent society . . . " *Id.* at 59, citing *Jacobellis v. Ohio* (1964) 378 U.S. 184, 199 (Warren, dissenting opinion). Accordingly, "[i]t is not for [this Court] to resolve empirical uncertainties underlying state legislation, save in the exceptional case where the legislation plainly impinges upon rights protected by the Constitution itself." *Paris* at 60, *citing*, *Ginsberg v. New York* (1968) 390 U.S. 629, 642-643.

III. LOS ANGELES' ZONING RESTRICTIONS ARE PERMISSIBLE CONTENT-NEUTRAL REGULATIONS ON CONDUCT

The opinion of the Ninth Circuit suggests that the "multiple-use" classification gives rise to an additional need for the State's production of evidence of "negative secondary effects." It is implicitly suggested that *Renton* cannot be applied to multiple-use adult businesses since they are of a different breed than a single-use business like a topless club or stand-alone bookstore.

Renton has not outlived its usefulness. Indeed, it is especially helpful in analyzing a regulation against multiple-use adult businesses. *Renton* upheld the principle that "[S]o-called "content-neutral time, place and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. [cites]." *Renton* at 475 U.S. 47.

In addressing the location of adult businesses, this Court has stated, "we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they

be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." *Young v. American Mini Theaters* (1976) 427 U.S. 50 at 62.

A. Los Angeles' "Multiple-Usage" Distinction is Reasonable and Neutral.

This Court has already stated that, "In our view, the First Amendment requires that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement." *Renton* at 475 U.S. 54. Los Angeles' adult bookstores and arcades cannot show that they are somehow deprived of the right to do business in the City of Los Angeles.

In order to regulate the time, place or manner of expression, a State must show the following: a.) That the city is within its broad power to regulate health and safety; b.) An important government interest is being furthered by the regulation; c.) The government interest is unrelated to the suppression of free expression; and, d.) The restriction is no greater than is essential to further the government interest. *Erie v. Pap's A.M.* (2000) 120 S.Ct. 1382 at 1394, *citing Renton, American Mini Theaters, Barnes,* and *National Citizens Comm. For Broadcasting.*

Here, the "multiple-usage" distinction is nothing other than a reasonable restriction placed on the "manner" in which business may be conducted. The distinction only speaks to the physical arrangement of a business, its manual operations and the conduct engaged in by patrons. Los Angeles could not be much more blatant in its attempts to regulate only "time, place and manner."

As in *Renton* and *American Mini Theaters*, the Los Angeles ordinance admittedly treats adult businesses differently from other types of businesses. In addressing such "discrimination," this Court acknowledged that the City of Renton had relied on evidence that related only to the potential negative effects caused by one adult business. Nevertheless, it was recognized that Renton was entitled to rely on the experiences of Seattle and other cities in making the finding of negative secondary effects. *Amicus Curiae* assert that the same rule of law should apply here.

B. Reliance on 20-Year-Old Studies is Reasonable

Here, the Ninth Circuit intimates that state agency's reliance on old studies is insufficient to meet the charge of the First Amendment. To the contrary, *Renton* specifically states that, "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as the evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses . . . We find no constitutional defect in the method chosen by Renton to further its substantial interests." *Renton* at 475 U.S. 51.

While Alameda Books may place defensive reliance on *FW/PBS, Inc., v. Dallas* (1990) 493 U.S. 215, 225-226, the Los Angeles ordinance places no prior restraint on anyone's ability to express themselves through erotic messages in the City of Los Angeles. Presumably, one can find whatever messages are to be found in the public display of sexuality through local dance clubs, adult videos, adult magazines, various adult phone services, the Internet and a whole host of other sources that are readily available for free or otherwise. The availability of alternative avenues for receiving erotic messages is obvious.

The "arcade" portion of an adult business is distinguishable from a "bookstore" area (which could be loosely viewed as a clearing house for constitutionally protected speech). There are alternative avenues of communication for the viewing of

video pornography. The customer can simply go home and enjoy the gild of the constitution through private viewing of the same material otherwise provided by the multiple-use adult business.

C. Reliance on Existing Case Law to Support Restrictions is Reasonable.

Prior to *Renton*, this Court stated that, "The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." *Paris Adult Theater I* at 413 U.S. 49, 63.

If the holdings of *Renton* and *Paris* can be judicially noticed by a trial court, it is senseless to force a city to go beyond judicial precedent, even if the regulation targets adult businesses only. The foundational stability provided by adherence to stare decisis should not be shaken by those interests residing at the fringes of the Constitution. It is also offensive to the concept of Separation of Powers that any court should be able to summarily supplant the judgment of a legislative body duly empowered to make decisions about the quality of life for its citizens.

This Court has recently stated that, "If States are able to regulate secondary effects, then . . . *de minimis* intrusions on expression cannot be sufficient to render the ordinance content based." *Erie v. Pap's A.M.*, *Id.* at 120 S.Ct. 1394-1395. Where the effects of regulation are directed to "secondary effects" and only incidentally affect expression, the *O'Brien* test applies. *Id.*

The method chosen by Los Angeles is identical, in all respects, to that chosen by the City of Renton. Certainly it

cannot be argued that Los Angeles' regulation is any more intrusive on free expression than the ban on public nudity in *Erie v. Pap's A.M.*

Given that this Court has already ruled on identical factual and legal concepts, Los Angeles, and any other municipality, should be able to reasonably rely on existing law. Were one to adopt the reasoning of Respondents, all municipalities would be forced to undergo and finance individualized studies to determine negative secondary effects. The boundaries of the First Amendment should not fall prey to unnecessary subjectivity.

Indeed, adult businesses could configure and reconfigure their business *ad infinitum* to trigger a need for "new" evidence relevant to the city's existing right to combat recognized societal problems. All the while, the essential content, entitled to some First Amendment protections, would not change. The First Amendment was not intended to be transfigured by means only connected to how one's business is physically arranged or by virtue of varying building facades.

One would not suppose that Respondents were against the idea that a city can place reasonable limits on the number of people in a building, hours of business operation, or other such restrictions. If one can admit of this reality, then it is very difficult to conceive of any offenses against the First Amendment by identifying video booths and bookstores as "separate" businesses for purposes of legitimate restrictions.

IV. THE NINTH CIRCUIT'S ADOPTION OF THE *COLACURCIO* STANDARD IS UNSOUND

The lower court created its own criterion for passing on the constitutionality of time, place and manner restrictions with its standard as set forth in *Colacurcio v. City of Kent* (9th.Cir.1999) 163 F.3d 545, at 551. The standard specifically incorporates language requiring that a city narrowly

tailor any restrictions to serve a significant government interest.

Neither *Renton*, nor any other opinion of this court, requires this high of a level of scrutiny. Had the lower court applied the *Renton* test to the Los Angeles ordinance, they would have come to a proper constitutional conclusion. Any deviation from the spirit of *Renton* creates an unnecessary quagmire of constitutional uncertainty.

CONCLUSION

For the foregoing reasons, the Honorable Court should reverse the judgment of the Ninth Circuit Court of Appeals herein.

Respectfully Submitted,

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May 11, 2001

MOTION FILED

MAY 11 2001

Supreme Court, U.S.
FILED

MAY 11 2001

OFFICE OF THE CLERK

No. 00-799 (L)

IN THE

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

—v.—

ALAMEDA BOOKS, INC. and HIGHLAND BOOKS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF MORALITY IN MEDIA, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Morality in Media, Inc. as *amicus curiae*,[1] files this brief in support of the Petitioner in this case, which is before this Honorable Court on the merits under the provisions of Rule 37. The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents are being filed concurrently with this brief.

Morality in Media is a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 notes 7 and 8 (1973).

Morality in Media has an interest in this case because it is frequently asked by law enforcement agencies, state legislatures, city councils, and private citizens for advice and guidance on methods to enforce and improve existing laws

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[1] This Brief *Amicus Curiae* was authored in whole by Counsel of Record Paul J. McGeady and Co-Counsel Robin S. Whitehead of Morality in Media, Inc. and no part of the brief was authored by any attorney for a party. No person or entity other than this *amicus* made any monetary contribution to the preparation or submission of this brief. Rule 37(6).

regulating the distribution of obscenity. MIM recognizes this case to be a major precedent in the area of locating and controlling the effects of sexually oriented businesses at the local level.

Morality in Media has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *United States v. Playboy*, 529 U.S. 803 (2000); *City News and Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743 (2001); and *Ashcroft v. Free Speech Coalition*, No. 00-795.

Amicus is filing this brief in support of the Petitioner because we believe our brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties.

SUMMARY OF ARGUMENT

The question upon which this Court has granted *certiorari* reads as follows:

> Is a city's zoning ordinance, which prohibits the operation of more than one adult entertainment business at a single location, including an adult bookstore and an adult arcade, invalid because the city did not study the negative effects of such combinations of adult businesses, but rather relied on judicially approved statutory precedent from other jurisdictions?

This question is the subject of this *amicus* brief and involves two lines of inquiry. First, whether it is necessary for a city to rely on sexually oriented business "use specific" studies under such circumstances. Secondly, whether or not a city may rely on judicially approved statutory precedent from other jurisdictions where that precedent may not involve "use specific" negative secondary effects.

The proposition that a municipality, in order to validly adopt a sexually oriented business ordinance that regulates the combination of two or more adult uses, must rely on newly created "use specific" studies does not comport with current case law. *Amicus* submits that, pursuant to the holding of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), new or original studies are not necessary in each community since *Renton* tells us that local legislative bodies may rely on the "detailed findings" in other jurisdictions to ascertain evidence of negative secondary effects. It is also permissible for a local legislature to use its collective common sense to take legislative notice that combinations of these types of adult uses will cause deleterious effects. The great body of evidence in the many studies conducted over the past three decades is worthy of judicial notice, as well as

legislative notice, in making these assessments. Additionally, *Amicus* contends that the most recent line of cases hold that it is proper for a municipality to introduce evidence after the ordinance has been challenged even if not noticed or incorporated at the time of enactment. As such, a court's inquiry is not restricted to pre-enactment evidence of negative effects.

Based on *Renton*, a municipality can rely on judicially approved statutory precedent from other jurisdictions. In *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980), the Forth Circuit Court of Appeals upheld a zoning statute that sought to prohibit the "supermarket technique" of clustering more than one sexually oriented business at a single location. In fact, the *Hart* Court, actually relied on the same 1977 City of Los Angeles study at issue in the instant case, as support in finding that location restrictions for adult establishments are a valid means of zoning aimed to serve the legitimate interests in preserving residential neighborhoods and preventing urban decay and crime. Consequently, it was proper for the City of Los Angeles to rely on the judicially approved statutory precedent created by *Hart* when they enacted the same regulation.

Amicus submits that *Renton* allows for cities to rely on judicially approved findings in other jurisdictions that have upheld the use of secondary effects studies treating sexually oriented businesses as a "class or category" of uses for the purpose of enacting content-neutral regulations in order to minimize crime and economic effects on surrounding communities. Inasmuch as the issue of the necessity for case specific studies has not been previously before this Honorable Court, *amicus* has cited and relied on lower court opinions where the issue has been considered.

ARGUMENT

I. IT IS NOT NECESSARY THAT A MUNICIPALITY SPECIFICALLY STUDY THE NEGATIVE EFFECTS OF "SEX SUPERMARKETS" WHERE TWO OR MORE ADULT USES ARE COMBINED UNDER ONE ROOF

A. *RENTON* ALLOWS FOR RELIANCE ON "DETAILED FINDINGS" IN OTHER JURISDICTIONS

The Court ruled in *Renton* that "the First Amendment does not require that a city conduct new studies or produce evidence independent of that already generated by other cities before enacting an ordinance, so long as whatever evidence the city relies on is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52. Based on this language, a city need not rely on studies at all, but instead can rely on other types of evidence, so long as "whatever evidence" the city relies on can be shown to reasonably establish the existence of a nexus between adult uses and unwanted negative secondary effects. Specifically, the *Renton* Court held that a city may rely on the experiences of other cities, and in particular on the "detailed findings" in other jurisdictions. *Id.* at 51.

In *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3rd Cir. 1993), the Third Circuit Court of Appeals upheld regulations limiting the hours of operation of adult entertainment establishments. The Court found adequate factual support for the Delaware legislature's conclusion that the asserted undesirable secondary effects it sought to regulate resulted from the operation of these establishments.

In reaching this conclusion, the *Mitchell* Court looked to the language in *Renton* where this Court held that a city could rely upon "the opinions expressed in court decisions of other jurisdictions to establish that the location of adult entertainment establishments have a harmful effect on an area... 475 U.S. at 51." *Mitchell*, 10 F.3d at 133. This Court also noted in *Renton*, at 51, that the "detailed findings" summarized in another state's court opinion were before the Renton's City Council when it enacted its ordinance.

The plaintiff bookstores in *Mitchell* argued that no evidence was presented that conclusively established a connection between the harms asserted to be prevented and the restrictions imposed. Specifically, the record showed that no documents or sworn testimony in support of the bill were presented to the State Senate, nor were any public hearings conducted, at which time the adult entertainment establishments could have voiced their objections and arguments. Those appellants further contended that official new studies should have been undertaken to determine how the licensed establishments' operating hours affected the welfare of the neighborhoods. 10 F.3d at 132.

In rejecting this argument the Court of Appeals reasoned that, "Logically, reliance on the governmental purpose of ameliorating the adverse effects of marginally protected speech or expressive activity presupposes knowledge of them." *Mitchell*, 10 F.3d at 134. The Court held that it was sufficient for the State to rely on and make reference in the synopsis of the Senate Bill to the case of *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986). The Third Circuit then found, in *Mitchell* at 136:

> In evaluating the importance of the governmental interest justifying a particular ordinance that incidentally restricts speech in order to curb the adverse effects of marginally protected activity, we do not think a court must close its eyes to evidence that has been presented and considered in other similar cases.

Accordingly, the *Mitchell* Court found that the Delaware legislature had before it a reasonable basis for deciding that the "closing-hours" amendment was needed to curb the harmful and unwanted incidental effects from sexually oriented businesses.

Likewise, in *Ben Rich Trading v. City of Vineland*, 126 F.3d 155, 162 (3rd Cir. 1997), the Third Circuit held that, although the studies and legislative record presented in *Mitchell* and other courts may have been more extensive than those referred to by the City of Vineland, it was permissible for the City to have relied on "the experiences, studies and conclusions of other jurisdictions about the secondary effects of adult theaters" and the City was not required to specify a "linkage" between its own experiences and those of the jurisdictions producing the studies upon which it intended to rely.

In *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000), the Seventh Circuit Court of Appeals affirmed the district court and held valid the Town's reliance on findings made in a similar case involving an hours of operation statute.

Although the Town did not recite a study or point to any local experience that showed why it believed such effects were correlated with such a business, it did submit to the district court that it had relied on the experience of West Allis, Wisconsin, which they found in *Tee & Bee v. City of West Allis*, 936 F. Supp. 1479 (E.D. Wis. 1996). When deciding to enact its ordinance, the "same factors" were deemed sufficient proof by the Town for enacting its

restricted hours of operation ordinance. *DiMa*, 60 F. Supp.2d 918, at 924 (W.D. Wis. 1998).

The district court in upholding the Town's reliance on the findings in *Tee & Bee* held:

> Just as in *Renton*, defendant seems to have gathered most of its "evidence" by reading prior decisions in which other municipalities were sued under similar circumstances. Regardless, just as in *Renton*, as "long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem," it is evidence enough. *Renton*, 475 U.S. at 52." *DiMa*, 60 F.Supp.2d at 924.

In *Schultz v. City of Cumberland*, 228 F.3d 831, 846 (7th Cir. 2000), the Seventh Circuit found that the city sufficiently established a secondary effects justification for its time, place or manner regulation, pointing out that its record was more extensive than that of the municipality in *DiMa*, 185 F.3d at 830, which relied solely on the judicial decision noting the experiences of another Wisconsin town.

The Eight Circuit in *Thames Enterprises v. City of St. Louis*, 851 F.2d 199 (8th Cir. 1988), also affirmed the district court's determination that the City of St. Louis's adult business zoning ordinance was constitutional despite the lack of original or further studies, empirical evidence, or an examination of the experiences of other cities regarding the effects of adult bookstores on neighborhoods.

The St. Louis Board of Alderman adopted the ordinance relying on the opinion of an Alderman that the regulation was necessary to the revitalization of city neighborhoods. The Alderman testified that he based his opinion on personal experience that "adult businesses were

not conducive to a 'stable, growing, vibrant neighborhood,'" *Thames*, 851 F.2d at 200, and that he patterned the ordinance after the Detroit ordinance upheld in *Young v. American Mini Theatres*, 427 U.S. 50 (1976). The Court of Appeals found the evidence relied on by the Board of Aldermen in adopting the ordinance sufficient to "qualify as the evidence recognized in *Renton*." *Thames*, 851 F.2d at 202.

As recently as January of this year, the Eleventh Circuit in *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1283 (11th Cir. 2001), in remanding the case to permit further development of the record pertaining to the local government's finding that sufficient evidence of secondary effects exists to support the nude dancing regulations at issue, stated:

> While courts still have insisted on some kind of a minimal evidentiary showing, even if that showing consists of nothing more than proof that the legislature reasonably relied on findings reported elsewhere suggesting a link between the proscribed expression and negative secondary effects. *See*, e.g., *Pap's*, 120 S.Ct. at 1395 (city could and did "reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood"); *Sammy's*, 140 F.3d at 997 ("experiences of other cities, studies done in other cities, case law reciting findings on the issue as well as [the officials'] own wisdom and common sense" deemed sufficient).

B. A LEGISLATIVE BODY CAN USE ITS COLLECTIVE COMMON SENSE TO CONCLUDE THAT A "SEX SUPERMARKET" CAUSES DELETERIOUS EFFECTS

In *Phillips v. Borough of Keyport*, 107 F.3d 164, at 178 (3rd Cir. 1997), the Third Circuit Court of Appeals, in remanding the case to provide the Borough the opportunity to present evidence of secondary effects of adult businesses in order to show proper justification for enactment of its zoning ordinance stated:

> Whatever level of scrutiny… in a given case, we have always found it acceptable for individual legislators to base their judgments on their own study of the subject matter of the legislation, their communications with constituents, and their own life experience and common sense so long as they come forward with the required showing in the courtroom once a challenge is raised.

Again, in *801 Conklin St. Ltd. v. Town of Babylon*, 38 F. Supp. 2d 228, 239 (E.D.N.Y. 1999), a Town's zoning ordinance was found validly enacted to address adverse secondary effects of adult uses, holding "local legislative bodies can take notice of or assume matters of common knowledge or experience."

As noted above, in *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3rd Cir. 1993), the Third Circuit upheld regulations limiting the hours of operation of adult entertainment establishments. In evaluating what evidence adequately supported the Delaware legislature's conclusion that the asserted undesirable secondary effects it sought to regulate resulted from the operation of these establishments, the Court stated at 133, fn.11:

> Legislative bodies, in enacting statutes, do not receive evidence or take sworn testimony in the manner of courts. Legislative committees sometimes conduct hearings on pending bills, but the testimony they take is often unsworn and the documents they receive unauthenticated. The principles embodied in bills on the floor of a legislative body are generally debated more or less in accord with principles of logic and rhetoric, not proven through the admission of evidence... The judgment of the members of Delaware's General Assembly, like that of other legislators, is exercised on the basis of their personal experience and the experience of their constituents; their judgment is not limited by the record presented to the assembled body.

In *Thames Enterprises v. City of St. Louis*, 851 F.2d at 202, the Eighth Circuit also stated, in this regard, that "personal observations and judgments of a legislator, together with the results of research of other sources, can have substantial weight. [These observations] fall into the category of experiences that can properly be considered by a legislative body in enacting an ordinance." *See also*, *LaGrange Trading Company v. Nicolosi*, 1991 U.S. Dist. LEXIS 3551 (E.D. La. 1991), *aff'd*, 953 F.2d 642 (5th Cir. 1992), *cert. denied*, 506 U.S. 817 (1992) (quoting *Thames* for the above proposition and also upholding the City of Kenner's adult business zoning ordinance despite a challenge that the city council did not have sufficient factual support of the secondary effects).

In *State v. Russo*, 745 A.2d 540, at 545 (N.J. Super. Ct. App. Div. 2000), the State court upheld the Township's sexually oriented business buffer zone ordinance against the operator's argument that the State failed to meet its burden because no evidence was presented to the governing body or

to the municipal court bearing on the alleged negative secondary effects of nude dancing, finding:

> In short, "a national consensus emerges regarding the harmful secondary effects of sexually oriented businesses." *Hamilton Amusement Ctr.*, 156 N.J. at 270. Although the State can meet its burden "by references to studies pertaining to other jurisdictions [and] legislative history," *Hamilton Amusement Ctr.*, 156 N.J. at 271, it may also rely on "consensus, and even common sense." *Ibid.*

C. POST-ENACTMENT EVIDENCE OF NEGATIVE SECONDARY EFFECTS IS PERMISSIBLE WHEN A SEXUALLY ORIENTED BUSINESS REGULATION IS CHALLENGED

The most recent line of cases hold that a court's inquiry is not restricted to pre-enactment evidence of negative effects and that, even if not considered at the time of enactment, it is indeed proper for a municipality to defend its law with evidence gathered after the ordinance has already been challenged.

In *Phillips v. Borough of Keyport*, 107 F.3d 164, 181 (3rd Cir. 1997), the Third Circuit refused to hold unconstitutional the Borough's adult business zoning ordinance on the ground that the Borough did not make a pre-enactment record before the legislature regarding secondary effects and that it had not presented any such evidence before the district court. Instead, the Court remanded the case to the district court so that the Borough had an opportunity to develop such evidence.

Moreover, the Appeals Court rejected the challenger's argument that *Renton* and *Mitchell* endorse "a per se rule that any governmental regulation of speech is invalid if the adopting entity did not have before it, at the time of adoption, evidence supporting the constitutionality of the action taken." *Phillips*, 107 F.3d at 178. Rather, the Court of Appeals explained that "a significant difference exists between the requirement that there be a factual basis for a legislative judgment presented in court when that judgment was challenged, and a requirement that such a factual basis have been submitted to the legislative body prior to the enactment of the legislative measure." *Id.*

A few months later in *Ben Rich Trading v. City of Vineland*, *supra*, 126 F.3d 155, the Third Circuit reversed the trial court's issuance of a preliminary injunction against the enforcement of an hours of operation ordinance and reaffirmed the principle it followed in *Phillips* pertaining to a municipality's ability to provide post-enactment evidence of negative secondary effects.

Although the Third Circuit acknowledged that the City must rely on evidence of negative secondary effects, the Court found no merit in Ben Rich's argument that the City "produced no evidence that it considered secondary effects of adult establishments at the time it passed the ordinances." *Id.* at 161. Pointing to *Phillips*, 107 F.3d at 178, the Court stated, "we rejected the argument that a municipality's justification must be apparent 'at the time of adoption,' or 'before taking [legislative] action.'" *Id.*

The Eleventh Circuit in *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, explained in its decision that post-enactment evidence may be properly presented when there exists a question regarding whether evidence existed as to secondary effects. Looking to other jurisdictions, the Eleventh Circuit reasoned that:

... courts have not hesitated to remand for further factfinding when dealing with these types of public decency statutes, especially when the alternative is to declare the statute invalid. See, e.g., *Pap's*, 120 S.Ct. at 1405-06 (Souter, J., concurring in part and dissenting in part) (determining that even though in his view "[t]he record before us does not now permit the conclusion that [the city's ordinance] is reasonably designed to mitigate real harms," the case should be remanded "to give it the opportunity to do so"); *J&B*, 152 F.3d at 373-75 (vacating and remanding where defendant failed to produce sufficient evidence that challenged ordinance would prevent secondary effects); *Phillips v. Borough of Keyport*, 107 F.3d 164, 173 (3d Cir.1997) (en banc) (vacating and remanding in similar circumstances).

When the Seventh Circuit in *DiMa Corp. v. Town of Hallie*, *supra*, 185 F.3d 823, affirmed the lower court's grant of summary judgment for the Town of Hallie, it concluded that the record sufficiently established that the hours of operation ordinance at issue was a reasonable attempt to control undesirable "secondary effects." In doing so, the Court referred to the Third Circuit's holding in *Phillips*, *supra*, that "a municipality may make a record for summary judgment or at trial with evidence that it may not have had when it enacted its ordinance." *Id.* at 829.

Although the Town of Hallie's ordinance did not repeat the evidence of a rational basis for belief that the hours restriction would help to ameliorate the spread of sexually transmitted diseases and the other effects it listed, the Appeals Court ultimately determined that the Town did present enough evidence by reference to judicial findings and decisions in this regard. The Court found that relying on the

experience of West Allis, Wisconsin, and citing the "same factors" used by that city in enacting its hours of operation ordinance was sufficient.

II. IT IS PROPER FOR A MUNICIPALITY TO RELY ON JUDICIALLY APPROVED STATUTORY PRECEDENT FROM OTHER JURISDICTIONS

A. THE *HART* CASE

In *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980), the Fourth Circuit Court of Appeals upheld the first "supermarket technique" zoning statute that restricted more than one sexually oriented business at a particular location. The *Hart* Court actually relied on the "1977 Los Angeles Department of City Planning, Study of the Effects of the Concentration of Adult Entertainment Establishments," to support the finding that the location restriction for adult establishments were indeed justified as a means of serving the legitimate interests in preserving residential neighborhoods and preventing urban decay. *Amicus* submits that, as it was proper for North Carolina in *Hart* to rely on the Los Angeles study to prevent sex business clustering, it was proper for the City of Los Angeles to rely on the judicially approved statutory precedent found in *Hart* when enacting the same regulation.

The Fourth Circuit in *Hart*, at 824, concluded that its decision was controlled by *Young v. American Mini-Theatres*, 427 U.S. 50 (1976), since "both the Detroit and North Carolina laws essentially regulate in similar fashion the place and manner of 'adult establishment' operations. The fundamental effect sought by both is geographic dispersal of these operations, in an obvious attempt to reduce adverse

external effects perceived to result from a concentration of 'adult' activities."[2]

In determining that the State statute was essentially a regulation of location, the Appeals Court held: "The North Carolina statute, like the Detroit Ordinance, is aimed at prohibiting a 'supermarket' marketing technique that offers for sale or exhibition at one business location a variety of sexual wares in addition to printed materials. Comparable regulation of specific techniques and methods of commerce in erotic material has not been thought violative of First Amendment values." *Id.* at 826.

The *Hart* Court concluded that the regulation furthered an important or substantial interest, since it was reasonable for the legislature to have determined that "the development of the 'total, under one roof' approach to the marketing of sexually explicit materials and devices tended to produce secondary effects destructive of the general quality of life in the neighborhood." *Id.* at 828. Furthermore, a legislative determination that the dispersal of the marketing activities could ameliorate the secondary effects to some extent, thereby furthering the state's interest, was found reasonable. *Id.* at 828-829.

Amicus submits that the City of Los Angeles's reliance on the *Hart* decision is enough to meet the *Renton* requirement that a local government may rely on evidence from other localities so long as it is "reasonably believed to

[2] If the propinquity of adult uses in the landmark *Young v. American Mini Theatres* case was believed by the Common Council to create a skid row atmosphere so much more so would two or more adult uses in the same building contribute to the creation of deleterious effects. *See American Mini Theatres*, 427 U.S. at 71, fn.34: "The Common Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime..."

be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52.

B. *RENTON* ALLOWS FOR RELIANCE ON JUDICIALLY APPROVED FINDINGS IN OTHER COMMUNITIES OF "STUDIES" TREATING SEXUALLY ORIENTED BUSINESSES AS A "CLASS OR CATEGORY" OF USES MAY BE RELIED UPON

Amicus submits that *Renton* also supports the rule that cities may rely on judicially approved findings from other jurisdictions where the sexually oriented businesses have been treated as a "class or category" for the purpose of content-neutral regulations, so as to minimize their negative effects on surrounding communities. Furthermore, *amicus* maintains that it was proper for the City of Los Angeles to rely on its own prior study to show that adult businesses produce negative secondary effects. Courts have continuously upheld other municipalities' reliance on the body of municipal "land use" and "crime impact" studies from across the Country, including this particular 1977 study.

In the recent case of *Kismet Investors, Inc. v. County of Benton*, 617 N.W.2d 85 (Minn. App. 2000), *review denied*, Nov. 15, 2000, 2000 Minn. LEXIS 709 (Minn. 2000), the State Appeals Court affirmed a trial court's finding that the County validly denied Kismet's application for a variance. The Court found that the preamble of the zoning ordinance properly included findings that adult uses cause secondary effects and the ordinance "reasonably relies on adult-use studies from St. Paul; Indianapolis; Los Angeles; Phoenix; Rochester, Minnesota; Adams County, Colorado; and Amarillo, Texas." *Kismet*, 617 N.W.2d at 93.

Plaintiff Kismet argued that Benton County's reliance on these studies was unreasonably flawed in that they address

circumstances different from Benton County's. In rejecting their argument, the Court explained that "the county need not demonstrate which secondary effects are attributable to each of its adult uses, but may pass ordinances to address the secondary effects of adult uses as a class and to address both existing and potential adult uses in Benton County. *See Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 138 (3d Cir. 1993) (stating that state need only show that adult entertainment establishments as a class cause secondary effects)." 617 N.W.2d at 94.

Most interesting in *Kismet* is the State Court's disagreement with the Ninth Circuit's opinion in the instant case, when it rejected Kismet's argument that "a recent Ninth Circuit opinion requires a more exacting analysis to determine whether a local government reasonably relied on an adult-use study. *See Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000) (1977 study finding that concentration of adult uses causes secondary effects does not justify ordinance prohibiting multiple adult uses in one building)." Rather, the *Kismet* Court concluded that, "*Mitchell* and *ILQ* demonstrate a better application of *Renton's* holding that a local government may rely on studies from other localities if the studies are 'reasonably believed to be relevant to the problem that the [locality] addresses.' *Renton*, 475 U.S. at 51-52, 106 S. Ct. at 931." 617 N.W.2d at 94.

Similarly, in *Buzzetti v. City of New York*, 140 F.3d 134, 136 (2d Cir. 1998), *cert. denied*, 525 U.S. 816 (1998), the Second Circuit upheld New York City's sexually oriented business zoning regulations and found that:

> New York City's reliance on studies from a variety of other areas of the country was well-placed... The DCP study included both a survey of numerous studies undertaken elsewhere--

> including Islip, New York; Los Angeles, California; Indianapolis, Indiana; Whittier, California; Austin, Texas; Phoenix, Arizona; Manatee County, Florida; New Hanover County, North Carolina; and the State of Minnesota... *See also*, *Hickerson v. City of New York*, 146 F.3d 99 (2d Cir. 1998) (case involving the Zoning Resolution of the City of New York regulating the zoning of adult establishment where Court recognized the New York Court of Appeals determination that "the City Council assembled an extensive legislative record connecting adult establishments and negative secondary effects, including numerous studies on the effects of adult establishments both within and without New York City." *Stringfellow's*, 91 N.Y.2d at 397 (1998)).

In *St. Louis County v. B.A.P.*, 18 S.W.3d 397, 413 (Mo. App. 2000), the Missouri Court of Appeals upheld the County's zoning and licensing ordinances in its finding that the local government had properly relied upon studies from other jurisdictions which were reasonably believed to be relevant to its problems and that courts "do not require exact identity between the types of businesses studied by the legislative body and plaintiff's adult business."

Based on that record, the State Court determined that it was clear the Council enacted the location restrictions in the ordinances to address the anticipated impact of adult oriented or sexually oriented businesses on the surrounding areas. The Court stated, "Here, the Department and its staff, as well as the RPC, acting at the direction and on behalf of the Council, studied and considered proposed ordinance language prior to enactment, and then submitted proposed ordinances, with recommendations, for the Council's consideration. The record reveals this process included the

receipt and consideration of three studies from St. Paul, Indianapolis, and Los Angeles." 18 S.W.2d at 411.

The Court rejected B.A.P.'s argument that studies relied upon by the legislative body must address business activities that are nearly identical to those regulated by the ordinance. The Court held: "We, however, agree with other courts, including the Eighth Circuit, that do not require exact identity between the types of businesses studied by the legislative body and plaintiff's adult business or all the adult businesses regulated by the challenged ordinance." *Id.* at 413.

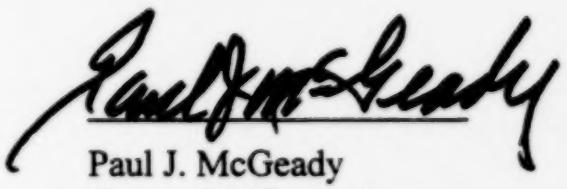
The State Court was also referring to *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994), *cert. denied*, 513 U.S. 1017 (1994), where the Eighth Circuit reversed the district court's conclusion that the city unreasonably relied on studies focusing on businesses that were not identical to plaintiff's business. *ILQ Invs., Inc.*, 25 F.3d at 1417. The Eighth Circuit held that the studies "identified and measured adverse secondary effects linked to adult businesses generally... Even if [plaintiff's business] is a new type of adult business, it may not avoid time, place, and manner regulation that has been justified by studies of the secondary effects of reasonably similar businesses. *Id.* at 1417.

Also in *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th cir. 1998), *cert. denied*, 525 U.S. 868 (1998), the Tenth Circuit held "differences in the mode of delivery of sexually oriented materials are constitutionally insignificant for purposes of determining an ordinance's content-neutrality." *See also, Ben Rich Trading v. City of Vineland*, 126 F.3d 155, 162 (3rd Cir. 1997) (concluding that a city is not required to "lay out in specific detail how its situation is sufficiently similar to [those jurisdictions conducting studies on which the city relied] in order to make their studies relevant").

CONCLUSION

For all of the above reasons, your *amicus* prays that this Honorable Court reverse the judgment of the court below or in the alternative remand for additional consideration and study.

Respectfully submitted,



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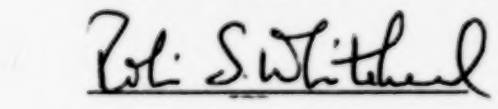

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May 14, 2001 (7)

No. 00-799

Supreme Court, U.S.
FILED
MAY 14 2001
CLERK

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HIGHLAND BOOKS, INC.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN PLANNING ASSOCIATION AND COMMUNITY DEFENSE COUNSEL IN SUPPORT OF THE CITY OF LOS ANGELES

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INTEREST OF AMICI[*]

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[*] Counsel of record for the parties in this case have consented to the filing of this brief, and their letters are on file with the clerk. Pursuant to Rule 37.6, amici disclose that no counsel for any party in this case authored this brief in whole or in part. No person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

Twenty-five years ago, this Court decided its first case concerning local land-use controls employed to prevent the "admittedly serious problems" caused by sexually oriented businesses. *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1974). In upholding Detroit's dispersal-type ordinance, the Court emphasized the "city's interest in planning and regulating the use of property for commercial purposes," *Id.* at 62, and came to this common sense conclusion: "We are not persuaded that the Detroit zoning ordinances will have a significant deterrent effect on the exhibition of films protected by the First Amendment." *Id.* at 60.

The Court was correct. None can deny that today purveyors of erotic messages enjoy an abundance, not a shortage, of "alternative avenues of communication" – not only in physical adult businesses, but also in cable television, CDs, DVDs, and the Internet. For nearly three decades, local sexually oriented businesses have continued to spread in both large cities and small towns: "Smaller municipalities that have never had a problem are trying to fix it so they never do. But like Johnston, they are finding it a difficult task. They are up against the complexities of Pornosprawl." Ellen Perlman, *X-Rated Businesses Spread from Cities into Suburbs*, Governing Magazine, Oct. 1997, at 48.

Amicus American Planning Association ("APA") represents the nation's land-use professionals – those charged with addressing the public's interest in how land is used and drafting regulations to ensure that the impacts of adverse land uses are minimized. As a nonprofit, educational research organization with more than 30,000 members nationwide, the APA is the oldest and largest organization devoted to advancing state and local land-use planning "in order to meet the increasing encroachments of urbanization upon the quality of life of [all] citizens." *Young*, 427 U.S. at 73 (Powell, J., concurring) (citing *Euclid v. Amber Realty*, 272 U.S. 365 (1926)).

The APA has forty-six chapters representing all fifty states, including a California State Chapter. More than 4000 of APA's members reside in the State of California. Members of the APA are routinely involved in comprehensive land-use planning and its implementation with land-use regulations. An overriding concern of the APA is that in order for comprehensive land-use planning to foster orderly and beneficial development, communities must have the tools and legal authority to deal effectively with a variety of types of land uses, including sexually oriented uses.

Amicus Community Defense Counsel ("CDC") is a nonprofit legal organization that serves land-use planners, city councils, and municipal attorneys in the area of adult business regulation. CDC provides municipal league training seminars, legal resources, and litigation services for communities dealing with the complexities of controlling secondary effects.

Amici contend that this Court should uphold the Los Angeles dispersal rule, just as it upheld Detroit's dispersal rule – as a "land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent." *Young*, 427 U.S. at 73 (Powell, J., concurring). The lower courts' invalidation of Los Angeles' multiple-use regulation – without describing how it would hamper the free flow of ideas – constitutes a usurpation of local decision-making and a voiding of cities' "reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 71 (plurality opinion). *Amici* contend that both the rationale and result of the court below should be reversed.

SUMMARY OF ARGUMENT

1. The First Amendment requires content-neutral "adult" business regulations to be justified by legislative evidence reasonably believed "to be relevant to the problem

the city addresses." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986); *accord Young*, 427 U.S. at 74 ("[T]he legislative judgment is to control in cases in which the validity of a particular zoning regulation is 'fairly debatable.'")

The City of Los Angeles has extensive experience with the secondary effects of multiple-use adult businesses, and has also conducted a study which demonstrates that secondary effects intensify when adult uses are concentrated together. Based on this information, the City reasonably concluded that the increased patronage of combined uses would lead to additional secondary effects, and that, even if the aggregate secondary effects would be no greater than when the same uses were separated into two locations, it is wise to disperse secondary effects into different locations to minimize their impact on any one area.

The lower court ignored the City's history of problems with multiple-use adult businesses and rejected the conclusions of the City's planning experts and council members. In doing so, the court substituted its judgment for that of the legislative body, and should be reversed.

2. The City's regulation is narrowly tailored in that it has restricted no "substantial quantity of speech" and is carefully targeted to affect "only that category of [businesses] shown to produce the unwanted secondary effects." *Renton*, 475 U.S. at 52. Nevertheless, the lower court invalidated the regulation because the legislative body failed to compare the specific secondary effects of multiple-use adult businesses with that of single-use adult businesses.

This rigorous, comparative analysis requirement is foreign to the Court's adult business precedents, and is unnecessary because courts have properly applied the *Renton* rule. By imposing this unreasonable means-end test, the lower court has eliminated the ability of the City's expert

planners to "experiment with solutions to admittedly serious problems," *City of Erie*, 529 U.S at 301 (quoting *Renton* and *Young*), and has created a new "empirical proof" requirement by conflating two distinct aspects of the *O'Brien* test. *Id.* at 300. This new form of intermediate scrutiny imposes an improper burden on legislative bodies and is constitutionally unwarranted. *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180, 213 (1997) (*Turner II*).

ARGUMENT

I. Municipalities Are Not Required To Prove Empirically That Combinations Of Adult Uses Have *More* Secondary Effects Than Singular Adult Uses.

"We do not understand [Respondents] to dispute in any fundamental way the accuracy of [the relevant facts], only their significance." *Turner Broadcasting Systems, Inc.* v. F.C.C., 520 U.S. 180, 214 (1997) (*Turner II*). Respondents Alameda Books, Inc. and Highland Books, Inc., both owned by Steven D. Wiener, have never disputed that combination adult uses do in fact cause secondary effects. *See National City v. Wiener*, 838 P.2d 223, 226 (Cal. 1990) (describing the secondary effects of Wiener's adult bookstore / peep show booth combination, including littered condoms and public sexual activity). Knowing Los Angeles' twenty-year history with these kinds of problems, Respondents have chosen to focus not on the veracity of secondary effects, nor on the regulation's impact (if any) on First Amendment values, but instead on the specificity of one aspect of the legislative evidence. Their new standard for that legislative evidence, which the Ninth Circuit accepted, is unwarranted and would severely hamper cities' efforts to control the adverse impacts of adult businesses.

Specifically, Respondents argue that "the City's 1977 study never made any attempt to evaluate whether independently operating "multiple-use" adult businesses created any greater adverse secondary effects on the surrounding community than [single-use] adult entertainment businesses..." Respondents' Brief in Opposition to Petition for Writ of Certiorari at 12. This is their core argument, and the empirical evidentiary requirement that runs throughout the District Court and Ninth Circuit opinions. District Court Order, Jan. 11, 1998, Joint Appendix, Vol. II at 280 ("If the operation of a bookstore and arcade as a multiple use does not produce the secondary effects observed in the 1977 studies, then the ordinance fails...."); *City of Los Angeles v. Alameda Books, Inc.*, 222 F.3d 719, 726 ("Like the county in *Tollis*, Los Angeles has presented no evidence that a combination of adult bookstore/adult arcade produces any of the harmful secondary effects in the Study.") This rigorous, comparative analysis requirement appears under several headings, including "not narrowly tailored," no "requisite evidence," and "no substantial government interest." However it is cast, this requirement is not the law for content-neutral regulations of adult businesses.

Time, place, and manner regulations are valid if they are: (1) justified without reference to the content of the regulated speech; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative avenues for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also United States v. O'Brien*, 391 U.S. 367, 377 (1968) (stating test in slightly different language). The lower court conceded that the regulation at bar is content neutral and that the City has a substantial interest in combating the secondary effects of adult businesses. However, the court concluded that the regulation is not designed to serve the City's interest in combating secondary effects. 222 F.3d at 724. Supplementing the cogent analysis of Counsel for Petitioner,

your *amici* will discuss the basis for the regulation as well as the lower court's misapplication of intermediate scrutiny.

A. Substantial Evidence Justifies Los Angeles' Findings That Combinations Of Adult Uses Cause Secondary Effects.

The City's experiences with sexually oriented establishments, as well as its own study, constitute substantial evidence to support the conclusion that multiple-use adult businesses cause secondary effects. The lower court's opinion would require a formal study of each secondary effect the City seeks to abate and an empirical analysis of the effectiveness of each proposed regulatory provision. Indeed, other applications of the "combination use" regulation – such as prohibiting a nude cabaret from operating under the same roof as an adult motel – would be subject to attack for failure to produce a "study" that such cabaret-motel combinations would be problematic. This Court's precedents establish that the City's interests in reducing prostitution, vice crimes, and urban blight are substantial. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000). The lower court's requirement of a "study" for every regulation is an unfortunate departure from this Court's rulings in *Young* and *Renton*, and an alteration of the substantial evidence standard which most cities cannot afford.

"Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Poppell v. City of San Diego*, 149 F.3d 951, 962 (9th Cir. 1998). Conflicting evidence does not prevent "[a] finding from being supported by substantial evidence," *Turner II*, 520 U.S. at 211, and is "irrelevant to the question of whether there is some evidence that does support" the multiple-use prohibition. *DiMa Corp.*

v. Town of Hallie, 185 F.3d 823, 831 (7th Cir. 1999). City planners and elected officials must be allowed "to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 665 (1994) (*Turner I*).

This Court has held that city councils are not required to make "a record of the type that an administrative agency or court does to accommodate judicial review," *id.*, and a court is "not to reweigh the evidence de novo," or to replace the legislature's conclusions with its own. *Turner I*, 512 U.S. at 666. "Governments must be given latitude as to approaches to deal with 'admittedly serious problems.'" *Renton*, 475 U.S. at 52 (citation omitted). For regulations of adult businesses, the "appropriate focus is not an empirical enquiry ... but rather the existence or not of a current governmental interest" that justifies the regulation. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring).

"Against this background of precedent, it is clear beyond question" that the Los Angeles City Council "had broad regulatory power to deal with the problem" of combination adult uses. *Young*, 427 U.S. at 74. Because substantial evidence, both past and present, demonstrates the reasonableness of the multiple-use prohibition, the lower court's decision should be reversed.

1. Los Angeles' Experiences With Adult Businesses, Especially Adult Bookstore / Peep Show Combinations, Demonstrate The Reasonableness Of The Regulation.

For more than thirty years, Los Angeles has sought to control the secondary effects caused by adult businesses.

The lower court's emphasis on whether the 1977 study analyzed adult bookstores and adult arcades as separate units or as single "combination" businesses is misplaced, because combination adult uses cause secondary effects and the City's dispersal requirement is a reasonable land-use regulation to help abate those secondary effects.

To be sure, the City's problems with combination uses were prevalent before the planning department began its study in 1977 and also prior to its explicit adoption of the multiple use regulation in 1983. *See People v. Perrine*, 120 Cal. Rptr. 640 (Cal. Ct. App. 1975) (upholding Los Angeles arcade regulations, noting that peep show booth conduct includes offensive, dangerous, and unlawful acts); *EWAP, Inc. v. City of Los Angeles*, 158 Cal. Rptr. 579 (Cal. Ct. App. 1979) (citing unsanitary acts in bookstore / peep show businesses); *DeMott v. Bd. of Police Comm'rs of the City of Los Angeles*, 175 Cal. Rptr. 879 (Cal. Ct. App. 1981) (same). In fact, the City continues to struggle to prevent the secondary effects of combination uses:

> [D]uring the last two and one-half years, one hundred seventeen arrests have been made which are directly attributable to the presence of Le Sex Shoppe; thirteen additional arrests have occurred in the last three months; three for masturbation within video booths; there had been numerous public complaints to the police department within the same time periods; police efforts to date had been unsuccessful, consuming substantial amounts of time with little success; and the imposition of prior conditions (including security guards and gating) has had little effect.

E.W.A.P., Inc. v. City of Los Angeles, 65 Cal. Rptr. 2d 325 (Cal. Ct. App. 1997)

As a backdrop to the 1983 regulation and as an ongoing problem, these experiences with adult bookstore / arcade combinations in *Perrine*, *EWAP*, *DeMott*, and *Wiener* are "such relevant evidence as reasonable minds might accept as adequate to support a conclusion" that separating combination uses would help to alleviate some secondary effects. The Ninth Circuit's contrary conclusion is "irrelevant to the question of whether there is some evidence that does support" the multiple-use prohibition. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999). The secondary effects studied by the Los Angeles Planning Department are more than ample evidence to support the City's regulation. Jt. App., Vol. I at 178-179 (showing, among other things, a 372.3 percent increase in prostitution in an area that went from 11 to 88 adult businesses).

Respondents' argument emphasizes that the City's study never proved that individual adult uses cause crime, but only that concentrations of those uses cause crime. Brief in Opposition to Petition for Writ of Certiorari at 12-13. The City, however, never assumed that individual adult uses were benign, but suddenly became malignant when concentrated together. This would be unreasonable as a matter of logic. Rather, the City's previous experiences with adult businesses demonstrated that individual establishments cause problems, and it was logically inferred from those experiences that the secondary effects of adult uses will intensify when adult uses concentrate.

Los Angeles' experience is expressly the type of legislative evidence that this Court has accepted in justifying local regulations to combat secondary effects. Formal studies have never been required, even where government regulations truly affect core political speech. *United States v. O'Brien*, 391 U.S. 367, 378 (1968). Indeed, much less probative evidence has been accepted than what Los Angeles compiled. *City of Erie*, 529 U.S. at 299 (plurality opinion)

("*O'Brien*, of course, required no evidentiary showing at all that the threatened harm was real."). *Renton*, 475 U.S. at 50-51 (upholding reliance on a prior case although dissent noted preamble was added after litigation began and the council "never actually reviewed any of the studies" cited therein); *Barnes*, 501 U.S. at 584 (citing current cases of prostitution at sexually oriented businesses); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994) (upholding legislative record on testimony that "nude dancing brought a certain element to the neighborhood" and that "there were 'problems in the neighborhood'").

Your *amici* submit that this Court's seminal decision in *Young* should control here. *In Young*, the City of Detroit did *not* conduct a formal study, but simply relied on its experiences and data gathered "from sociologists and urban planning experts, as well as some laymen, on the cycle of decay that had been started in areas of other cities, and that could be expected in Detroit," 427 U.S. at 81 n.4 (Powell, J., concurring).

This Court, rejecting the challenge to the legislative record, upheld the ordinance because "the Council was motivated by its perception" that concentrations of adult businesses wrought a "deleterious effect upon the adjacent areas" and could "contribute to the blighting or downgrading of the surrounding neighborhood." *Id.* at 75. Emphasizing the minimal potential impact that the regulation would have on the flow of ideas, Justice Powell explained that "the legislative judgment is to control in cases in which the validity of the legislation is 'fairly debatable.'" *Id.* (quoting *Euclid v. Amber Realty*, 272 U.S. 365, 388 (1926)).

In this case, the City's evidence showed that individual adult uses cause secondary effects and that these secondary effects intensify when adult uses concentrate. Thus, the City's expert planners concluded that dispersing

adult uses could ameliorate some of those secondary effects. This is a reasonable conclusion, and all that is required to satisfy the deferential test for legislative judgments justifying regulations like these, which do no significantly impact free speech:

> When an individual or a group of individuals is silenced, the message itself is silenced and free speech is stifled.... But a zoning ordinance that merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression.

427 U.S. at 81 n.4 (Powell, J., concurring).

The City of Los Angeles, like the City of Detroit in *Young*, has "silenced no message" and has eliminated no "opportunity for a message to reach an audience." *Id.* at 78-79. Substantial evidence shows that the City's regulation is properly aimed at combating the secondary effects of multiple-use adult businesses.

2. Logical Inferences Demonstrate The Reasonableness Of The Regulation.

This Court has held that legislative bodies must be allowed "to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner I*, 512 U.S. at 665. For cities, this ability is nowhere more important than when land-use planning is used to prevent secondary effects, one of the "the most essential function[s] performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Young*, 427

U.S. at 80 (Powell, J., concurring) (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974)).

There are at least two logical inferences supporting the City's reasonable belief that the body of knowledge before it was relevant to the problem the City sought to address.

First, it was reasonable for the Los Angeles City Council to believe that a sex "superstore" or combinations of adult uses would attract a larger number of transients than solitary adult uses would attract. The increase in patronage could easily lead to an increase in illicit activity in or around the premises.

The Court has previously permitted this type of reasonable inferences in adult business cases. For example, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1990), the Court upheld – as applied to adult businesses – an Indiana public indecency law for which *no legislative record existed.* Justice Souter, citing instances of prostitution at adult businesses, concluded: "It is possible, for example, that the higher incidence of prostitution and sexual assault in the vicinity of adult entertainment locations results from the concentration of crowds of men predisposed to such activities..." *Id.* at 586 (Souter, J., concurring).

Similarly, planning experts in Los Angeles were entitled to draw similar conclusions about "combined" adult uses and their tendency to produce harmful secondary effects. It is clear that the Planning Department considered "multiple use" establishments to be another manifestation of the "concentration" problem targeted by the 1977 ordinance. Staff Report to the City Planning Commission, Jt. App., Vol. I at 27. Specifically, the staff noted that "the degree of deleterious effects of adult entertainment businesses depend[s] largely on the particular type of business and on

how any such business is operated." Jt. App., Vol. I at 38. It was also the staff's expert judgment that the proposed 1983 ordinance "is in substantial conformance with the public necessity, convenience, general welfare and good zoning practice by prohibiting more than one adult entertainment business in the same building, structure, or portion thereof..." Jt. App., Vol. I at 27.

This Court's precedents teach that the City's determinations in this regard are entitled to substantial deference. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000). Nevertheless, the Ninth Circuit rejected the City's conclusions as unreasonable and offered the following analysis:

> Nor could Los Angeles have reasonably concluded that the expansion of an adult bookstore to include an adult arcade would increase the frequency and regularity of activity for the business and heighten the probability that such activity would produce the harmful secondary effects identified in the Study. Such reasoning would justify the prohibition of the simple expansion of a lone adult bookstore in order to accommodate a larger variety of adult products (which, ostensibly, would attract more patrons), and not for the purpose of installing an arcade. Such a prohibition, however, is clearly not supported by the Study.
>
> 222 F.3d at 726.

These statements are irrelevant under this Court's precedents and insufficient to justify invalidation of the City's regulation.

The first statement, that combining uses will not increase business activity and the attendant secondary effects, is illogical because the record reveals that Mr. Wiener himself deliberately contravened the regulation and combined two adult uses in order to *increase patronage* to his peep show booth operations, which supposedly struggle to make money. Declaration of Steven D. Wiener, June 27, 1997, J.A. at 235; *id.* at 230 ("[I]t is my opinion that an adult arcade has a significantly greater chance of succeeding and remaining in operation if such business operates within an adult bookstore.") This economic – not constitutional – interest in increased patronage is the reason that combined uses exist.

The first statement of the Ninth Circuit's analysis is also irrelevant because it merely states an inconsistent conclusion drawn from the evidence. Such a conflicting conclusion does not prevent "[a] finding from being supported by substantial evidence," *Turner II*, 520 U.S. at 211, and is "irrelevant to the question of whether there is some evidence that does support" the multiple-use prohibition. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999). As explained above, more than ample evidence supports the City's judgment that combination uses produce secondary effects. Especially in the absence of *any* contrary evidence, "the city's expert judgment should be credited." *City of Erie*, 529 U.S. at 298.

The court's second statement, concerning a hypothetical "anti-expansion" regulation, is an irrelevant "straw man" argument. As an initial matter, the City never adopted such a regulation, and whether the logical inference about concentrated uses would justify an entirely different regulation is not before the Court. But more important, the court's hypothetical fails to negate the fact that secondary effects attend combination businesses, or the fact that the study's correlation between crime and adult use concentrations is relevant to the secondary effects problem

the City is addressing. The only aspect of this case to which the lower court's hypothetical is relevant is the determination of whether that court substituted its judgment for that of the Los Angeles City Council. It did.

The Fourth Circuit demonstrated the better approach to legislative inferences in *Hart Bookstores, Inc. v. Edmisten*, 612 F.2d 821 (1979). In *Hart*, the Fourth Circuit upheld a virtually identical regulation as furthering the substantial government interest of preventing illicit sexual conduct and the spread of disease. *Id.* at 829. The following comments from that decision support the conclusion that the Court's rationale in *Young* justifies the multiple-use regulation as a reasonable means of dispersing secondary effects:

- "much of our analysis *parallels and draws from* the Mini-Theatres analysis," *id.* at 824;
- "[the two dispersal provisions] *essentially regulate in similar fashion* the place and manner of "adult establishment" operations," *id.* at 824-825;
- "The fundamental *effect sought by both is geographic dispersal* of these operations, in an obvious attempt to reduce the adverse external effects," *id.* at 825;
- "*Comparable regulation* of specific techniques and methods of commerce in erotic materials has not been thought violative of First Amendment values." *id.*;
- "The legislature *could reasonably have determined* that the development of the 'total, under one roof' approach to the marketing of sexually explicit materials and devices tended to produce secondary effects," *id.* at 828;
- "A legislative determination that the dispersal of the marketing activities might ameliorate these secondary effects ... *cannot be thought unreasonable*." *id.* at 828-829.

612 F.2d 821 (emphasis added).

These statements in *Hart* demonstrate the objective reasonableness of the multiple-use prohibition and validate the City's conclusion that the prohibition would advance substantial government interests. Contrary to Respondents' assertions that this regulation is "obscure," dozens of planning departments and city councils – both inside and outside California – have reached this same conclusion and have adopted prohibitions on "multiple use" adult businesses. *See, e.g.*, Gardena, CA, Mun. Code Sec. 18.62.070(B); Lancaster, CA, Mun. Code Sec. 251.026(4); Lompoc, CA, Mun. Code Sec. 8821.2(3)(D); Prescott, AZ, City Code Title 5-7-12-D; Aurora, CO, City Code Sec. 32.5-52(E); Charlotte, NC, City Code Ch. 6, Art. X, Sec. 6-137; Memphis, TN, Ch. 20, Sec.20-126(c).

In studying the concentration issue, the Minnesota Attorney General's Working Group on the Regulation of Sexually Oriented Businesses reached the following conclusion:

> The evidence suggests that the impacts of sexually oriented businesses are exacerbated when they are located near each other. Police officers testified to the Working Group, that "vice breeds vice." When sexually oriented businesses have multiple uses (i.e., theater, bookstore, nude dancing, peep booths), one building can have the impact of several separate businesses.

Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses, June 6, 1989, at 13.

To deal with the secondary effects of adult uses, the Working Group suggested the regulation at issue:

> To reduce adverse impacts from concentration of these businesses, communities should adopt zoning ordinances which set distances between sexually oriented businesses and between sexually oriented businesses and liquor establishments, and should consider restricting sexually oriented businesses to one use per building.

Id. at 5.

Though Respondents would reject this evidence, arguing that the City is "locked in" to its justifications articulated in 1983, the "appropriate focus is not an empirical enquiry ... but rather the existence or not of a current governmental interest" that justifies the regulation. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring). This more current evidence simply validates the evidence of secondary effects of combination uses that Los Angeles has been compiling for more than twenty years.

A second reasonable inference supports the multiple-use prohibition. Even if the regulation does not reduce the overall number of secondary effects, it will nevertheless disperse the current secondary effects of adult uses across a wider geographic area, thereby avoiding the concentration of adverse impacts in any one neighborhood. On this point, the City's prior experiences with multiple-use businesses, its 1977 findings, and its more current problems with adult bookstore and peep show combinations are dispositive. *See e.g., National City v. Wiener*, 838 P.2d 223, 226 (Cal. 1990). Each provides evidence "reasonably believed to be relevant to the [secondary effects] problem that the city addresses." *Renton*, 475 U.S. at 51-52.

Lay aside briefly the fact that Respondents have proffered no conflicting evidence for their idea that combination uses cause no greater secondary effects than singular uses. Suppose that in a given year, police make 100 calls to an adult bookstore (a retail use) for incidents of pornographic litter, patrons engaging in sexual acts in the parking lot, and disorderly patrons causing problems for management. During the same year, police make 100 calls to a peep show booth operation (arcade use) at another location for similar problems. Even assuming that the two adult uses, operated in the same building, would cause only the same total number of police calls (200), the City still has a substantial interest in dispersing the secondary effects to two different locations in order to minimize the adverse impacts in any one location. Knowledge of illicit activity in and around adult uses, including combination uses, is still such relevant evidence as reasonable minds might accept to support the conclusion that the dispersal regulation would reduce the aggregate impact of secondary effects in a neighborhood.

By rejecting these logical inferences, the lower court "reweigh[ed] the evidence de novo," and improperly replaced the legislature's conclusions with its own. *Turner I*, 512 U.S. 622, 666 (1994). Such judicial decision-making eliminates the ability of local governments to "experiment with admittedly serious problems," *Renton*, 475 U.S. at 52, and should be rejected.

Notwithstanding Respondents' repeated reliance on an incorrect view of substantial evidence, and their desire to have the Court rigorously evaluate the economic implications of the statute, Brief in Opposition to Petition for Certiorari at 6-7, Los Angeles' dispersal regulation is supported by past and present facts, prior judicial approval, and logical inferences. Its legislative body is entitled to

judgment as a matter of law. *Turner II*, 520 U.S. at 211; *DiMa*, 185 F.3d at 831.

B. The Ninth Circuit's Rigorous Means-End Requirement Is Foreign To The Doctrine Of Intermediate Scrutiny.

Respondents, and the lower court, made much of the fact that "the Study addressed the secondary impact not of single adult business establishments, but of concentrations of separate, individual adult businesses, and that [combination use] businesses are not separate in the sense that the businesses surveyed in the Study were separate businesses." 222 F.3d at 724. As explained above, this statement is irrelevant because it is undeniable that combination uses cause secondary effects and that this is the problem the City is addressing.

Nevertheless, this comparative analysis standard – wholly absent from this Court's adult business precedents – has been applied to invalidate reasonable municipal ordinances, not only for alleged legislative failure to make comparisons between singular and combination adult uses (as in this case), but also for failure to rigorously compare the problems of adult businesses with those of non-adult businesses. *See Flanigan Enters. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001) (invalidating prohibition on full nudity in alcohol bars simply because bars without nudity had more police calls during a particular period); *but see California v. LaRue*, 410 U.S. 948 (1973) (upholding prohibition on fully nudity in bars without regard for the comparative problems of other businesses). Courts applying this comparative analysis standard generally conclude that the regulation at issue is not narrowly tailored to serve a substantial government interest. However, such a standard is foreign to the doctrine of narrow tailoring.

"The essence of narrow tailoring" is "focusing on the evils the [Government] seeks to eliminate ... [without] significantly restricting a substantial quantity of speech that does not create the same evils." *Turner II*, 520 U.S. at 216 (citing *Ward*, 491 U.S. at 799, n.7). The requirement is met if the rule is "not substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800. In the adult business context, a regulation is narrowly tailored if it "affect[s] only that category of [businesses] shown to produce the unwanted secondary effects." *Renton*, 475 U.S. at 52. Comparative analysis – between adult and non-adult businesses, or among categories of adult businesses – has never been, and should not be, required. *Schultz v. City of Cumberland*, 26 F.Supp.2d 1128, 1143 (W.D. Wisc. 1998) ("Contrary to plaintiffs' assertion, these findings need not be measured against the law enforcement problems associated with non-sexually oriented businesses in Cumberland. Nothing in Renton or any of the three opinions written by the Barnes majority would require defendant to engage in this type of rigorous, comparative analysis.").

In this case, Respondents have failed to identify any "substantial quantity of speech" that the regulation restricts, or any non-sexually oriented businesses being targeted by the City. Nevertheless, they contend that the dispersal regulation is not narrowly tailored because the City failed to compare the secondary effects of multiple-use adult businesses with those of stand-alone adult businesses. Brief in Opposition to Petition for Certiorari at 12-13. Essentially, Respondents claim that failure to conduct, or rely on, such a comparative study renders the City's determination unreasonable. Unfortunately, the Ninth Circuit accepted Respondents' newly-created standard, 222 F.3d at 724-728, and in the process misapplied *Tollis v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987). The lower court's reliance on *Tollis* is clearly erroneous.

In *Tollis*, a county official had interpreted the county's adult use ordinance to apply to mainstream theaters if the theaters showed pornographic films on just one occasion. The plaintiff challenged the ordinance on the grounds that, as interpreted, it was overbroad on its face. *Id.* at 1331. The district court agreed, and granted a permanent injunction. *Id.*

On appeal, the Ninth Circuit affirmed, but instead of couching its decision in terms of overbreadth, it concluded that the ordinance was not narrowly tailored to serve a substantial government interest because the category of regulated establishments went beyond adult businesses and reached establishments not associated with secondary effects:

> Here, the County has presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community. The County has thus failed to show that the ordinance, as interpreted by the County to include any theater that shows an adult movie a single time, is sufficiently "'narrowly tailored' to affect only that category of theatres shown to produce the unwanted secondary effects." *Renton*, 106 S. Ct. at 931.

Id. at 1333.

The Ninth Circuit concluded that, "[l]ike the county in Tollis," Los Angeles had presented no evidence that combinations of adult uses cause secondary effects. 222 F.3d at 725. However, it is clear that the Ninth Circuit invalidated the San Bernardino County ordinance not because the county failed to show that adult businesses or a subclass of adult businesses produce secondary effects, but

rather because the county interpreted its ordinance to apply to theaters that are *not adult businesses at all* – and therefore do not cause the secondary effects that the county has a substantial interest in abating. Such a defect is absent from this case because the Los Angeles regulation applies only to a narrowly defined category of sexually oriented businesses associated with harmful secondary effects. Whatever the propriety of the *Tollis* decision may be, it has no relevance to this case.

An additional error in the Ninth Circuit's narrow tailoring analysis is highlighted in the court's August 28, 2000 order amending its original opinion. The last sentence of the penultimate paragraph in the court's original opinion stated:

> Therefore, any inference that the statute *could have an ameliorating impact* on the identified harmful secondary effects would be unreasonable under both *Tollis* and *Acorn*.

222 F.3d at 728.

The court's August 28 order modified the above sentence to read:

> Therefore, any inference that, absent the statute, the harmful effects *would be ameliorated* would be unreasonable under both *Tollis* and *Acorn*.

222 F.3d 719, 2000 U.S. App. LEXIS 21759, Order Amending Opinion and Denying Rehearing at 1.

Contrary to the Ninth Circuit's opinion, this Court has never held that every application of the ordinance has to effectively eliminate secondary effects. Such a standard is

foreign to intermediate scrutiny, even as applied to other regulations deserving less deferential review than sexually oriented business regulations deserve. *See, e.g., Turner II*, 520 U.S. at 213. ("The level of detail in factfinding required by the [Respondents] would be an improper burden for courts to impose on the Legislative Branch. That amount of detail is as unreasonable in the legislative context as it is constitutionally unwarranted.")

By requiring the City to prove that the regulation will *substantially* further or even completely achieve the government interest, the Ninth Circuit's approach "conflates two distinct concepts under *O'Brien*: whether there is a substantial government interest and whether the regulation furthers that interest." *City of Erie*, 529 U.S. at 300. This Court has repeatedly held that local governments "must be allowed to experiment with solutions" to the serious problem of secondary effects, *id.* at 301 (quoting *Renton* and *Young*), and the City's regulation is based on logical inferences that it will at least help to solve that problem. Of course, the multiple-use prohibition will not eliminate all illicit activities in adult arcades. But it is not required to do so in order to be reasonable. *Id.* ("To be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but *O'Brien* requires only that the regulation further the interest in combating such effects.") The City's ordinance is likely to further the City's interest in combating secondary effects by preventing an increase in illicit activities and by dispersing secondary effects across a wider geographic area. For these reasons, it should be upheld.

CONCLUSION

The City's regulation has no discernible impact on First Amendment values, and is a reasonable approach to abating the secondary effects of multiple-use adult businesses. Respondents' core argument for heightened

scrutiny of the legislative record has never been the law governing content neutral time, place, and manner regulations for adult businesses. The lower court's decision should be reversed.

Respectfully submitted,

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Dated: May 15, 2001.

May 15, 2001

(8)

No. 00-799

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THE CITY OF LOS ANGELES,
Petitioner,

v.

ALAMEDA BOOKS, INC., AND HIGHLAND BOOKS, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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37 pp

QUESTION PRESENTED

Whether the First Amendment requires a municipality to compile evidence of the adverse secondary effects of specific adult business combinations prior to enacting content-neutral zoning ordinances designed to ameliorate secondary effects.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.[1] The subject of this case—the evidentiary burden that a state or local government must meet in order to enact an ordinance zoning adult business uses—is of utmost importance to *amici* and their members.[2]

In the past 30 years, the regulation of adult businesses has become an issue of great prominence for municipalities and States. This is because "[t]he number of adult businesses and the quantity of adult entertainment on the market has increased explosively over the past three decades." Jules B. Gerard, *Local Regulation of Adult Businesses: 2001 Edition* § 1.02, at 2 (2000). Adult businesses "now appear in virtually all communities." *Id.* at v.

Municipalities, in particular, have a compelling need to protect their citizens from the adverse secondary effects that so often flow from the operation of these businesses, with the consequent "'harmful effect'" on neighborhoods and their "'contribut[ion] to neighborhood blight.'" *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986) (quoting

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent filed with the Clerk of the Court. This brief was not authored in whole or part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution towards its preparation or submission.

[2] Although local governments are responsible for most regulation of adult entertainment, some States regulate in this area. *See, e.g.*, Del. Code Ann. tit. 24, §§ 1601-1635 (2001); *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 131-39 (3d Cir. 1993) (upholding Del. statute limiting hours of operation); N.C. Gen. Stat. §§ 14-202.10—14-202.12; *Hart Book Stores, Inc. v. Edmisten*, 612 F.3d 821, 826-30 (4th Cir. 1979) (upholding N.C. Gen. Stat. § 14-202.11, which prohibits multiple adult uses in a single building).

Northend Cinema, Inc. v. City of Seattle, 585 P.2d 1153, 1156 (Wash. 1978)). Zoning ordinances, because they do not ban speech, "currently are the most popular form of regulation of adult entertainment." Gerard, *Adult Businesses* at vi.

The court below invalidated a mere clarification of a then-recently enacted zoning ordinance designed to ameliorate the secondary effects of adult businesses by dispersing them. Its holding stands as a major obstacle to efforts by municipalities to regulate adult businesses in a fair and even-handed way through the use of the zoning power. Because of the importance of the issue presented to *amici* and their members, *amici* respectfully submit this brief to assist the Court in its resolution of this case.

STATEMENT OF THE CASE

A. History of the Los Angeles Adult Entertainment Zoning Ordinance, L.A.M.C. § 12.70

The City of Los Angeles ("the City") has regulated businesses engaged in "adult uses" for almost a century. "[I]n 1915, the prevalence of sex evils arising out of massage parlors" led the City Council to enact an ordinance banning persons of one sex from administering massages to persons of the opposite sex. *See In re Maki*, 133 P.2d 64, 69 (Cal. Ct. App. 1943) (citing Los Angeles Municipal Code § 27.03) ("L.A.M.C."). The purpose of the ordinance was to "safeguard against the deterioration of the social life of the community." *Id.*

Beginning in the late 1960's, the City experienced a burgeoning of sex-related establishments, including nude bars, sexual scam joints, arcades, massage parlors, newsracks, adult theaters, and bookstores. J.A. 70 (Study of Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles, June 1977) ("Los Angeles Study"); *id.* at 179 (Los Angeles Police Department statistical review). *Cf. California v. LaRue*, 409 U.S. 109, 110-11 (1972)

(documenting secondary effects in California in late 1960's resulting from increase in adult bars, which included increases in prostitution, indecent exposure, rape, and attempted rape).

The concerns of citizens and elected officials of Los Angeles led to numerous actions by the City Council to deal with the problems resulting from this proliferation of adult entertainment businesses. *See* J.A. 72-75 (summary of City Council actions relating to adult entertainment between March 1970 and May 1977).

At the same time, the City Police Department prepared a report, "The Impact of Sex Oriented Businesses on the Police Problem in the City of Los Angeles" ("Police Report").[3] The introduction to the Police Report explained that "[d]uring the past several years, the City . . . has been confronted with the problem of proliferating sex oriented Adult Entertainment Establishments," a type of business that "includes, but is not limited to, massage parlors, adult movie theaters and arcades, adult bookstores, and other sexually oriented enterprises." J.A. 173. The Police Report stated that "these businesses may have had blighting effects on both business and residential communities." *Id.* at 173-74.

The Police Report focused on the City's Hollywood area "because the problem is most prevalent there due to the clustering and proliferation of the sex oriented Adult Entertainment Establishments during the past seven years." *Id.* at 174. The report found that "Part I" crimes—"those criminal acts which most severely effect their victims . . . includ[ing] homicide, rape, aggravated assault, robbery, burglary, larceny, and vehicle theft," J.A. 175—had, during the period 1969-75, increased in Hollywood at almost twice

[3] The introduction and the first section of the Police Report, which discusses crime statistics in the Hollywood area, are reproduced at J.A. 173-83. The full report is part of the record in the Ninth Circuit. *See* Appellant's Excerpts of Record, No. 98-56200, Vol. 3, at 658-852.

the rate as in the City as a whole. *Id.* Even more striking was the increase in prostitution and pandering in Hollywood: arrests for prostitution increased by 372.3% from 1969 to 1975, compared to a 24.5% increase in the City as a whole. J.A. 176. Arrests for pandering increased by 475% in Hollywood and 133.3% in the City during the same period. *Id.*

The concluding paragraph of the Police Report contains a chilling summary of the adverse secondary effects of the massive proliferation of adult businesses in Hollywood during the period 1969-75:

> This survey reflects a seven-year span during which . . . the Adult Entertainment Establishments in the Hollywood Area proliferated from a mere 11 establishments to an astonishing . . . 88 such locations. The overall deleterious effect to the entire community is evident in the statistics provided. The overwhelming increase in prostitution, robberies, assaults, thefts, and the proportionate growth in police personnel deployed throughout Hollywood, are all representative of the blighting results that the clustering of Adult Entertainment Establishments has on the entire community. These adverse social effects not only infect the environs immediately adjacent to the parlors but create a malignant atmosphere in which crime spreads to epidemic proportions.

J.A. 177.

On January 12, 1977, the City Council directed the City Planning Department "to conduct a comprehensive study, with the assistance of the Police Department, City Attorney and other appropriate City agencies, to determine whether and to what extent the concentration of . . . adult entertainment businesses has a blighting and degrading effect upon the neighborhoods in which they are situated." Pet. App. 60a (Ordinance No. 151294, adopted July 18, 1978).[4]

[4] The complete Los Angeles Study is found at J.A. 35-162.

The 1977 Los Angeles Study was based on the Police Report discussed above, analyses of property assessments, public meetings, questionnaires, and census data. *See* J.A. 36. The Study also analyzed zoning ordinances enacted in other large cities such as Boston, which zoned for the concentration of adult businesses into a single pre-existing "Combat Zone," J.A. 55-57, and Detroit, which had zoned for their dispersal. *Id.* at 57.[5]

The Los Angeles Study recommended that the City adopt a "dispersal type" of ordinance for the zoning of adult businesses. *Id.* at 40. It recommended, however, that "such an ordinance should be designed for specific application in the City . . . rather than the direct adoption of the Detroit model." *Id.* at 41. As a result, the zoning ordinance adopted by the City was more favorable to adult businesses than the Detroit ordinance in at least one important respect. Unlike the Detroit ordinance, which prohibited 11 different "adult uses" from being located "within 500 feet of any area zoned for residential use," the Los Angeles ordinance does not contain any prohibition concerning proximity to residential areas.[6] *Compare Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 52 & nn. 2, 3 (1976) (describing Detroit dispersal ordinance) *with* Pet. App. 67a (L.A.M.C. § 12.70.C)

[5] The Los Angeles Study also examined the adoption by a number of other cities, "spurred" by "[t]he success of the Detroit ordinance," J.A. 58, of the Detroit dispersal approach. The dispersal ordinances adopted by other cities are summarized in the Study at J.A. 61-63. The Los Angeles Study concluded that "[w]hile several major cities have adopted ordinances similar to the Detroit ordinance, no other major city has, to our knowledge, adopted a Boston-type ordinance." *Id.* at 38.

[6] As the Los Angeles Study explained, because of the extensive use of commercial "strips" throughout the City, adopting the residential restriction employed by Detroit would "limit the potential locations for such businesses rather severely." J.A. 40.

The Los Angeles ordinance also contained an amortization period, another protective provision for adult businesses. *See* Pet. App. 67a-68a.

(establishment of adult business prohibited "within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park").

On July 18, 1978, the City Council enacted, and the Mayor signed into law, Ordinance 151294, which added § 12.70, "Adult Entertainment Zoning," to the City Code. Pet. App. 60a-61a; 69a. The ordinance contained numerous findings by the City Council, including the "growing concern on the part of public officials and residents . . . regarding the appearance of a blighting and degrading effect upon certain neighborhoods . . . from the concentration of sex-oriented, adult entertainment businesses." *Id.* at 60a. The dispersal ordinance was therefore adopted "in order to preserve the public health, peace, safety, and general welfare by regulating adult entertainment businesses in such a manner as to prevent their further concentration and the continued erosion of the character of affected neighborhoods of the City." *Id.* at 61a.

The definitional subsection of the ordinance, § 12.70.B, contained provisions identifying a variety of separate adult uses subject to the ordinance, including "Adult Arcade," *id.* at 62a (§ 12.70.B.1), "Adult Bookstore," *id.* (§ 12.70.B.2), and "Adult Theater." *Id.* at 63a (§ 12.70.B.5). The definition subsection was followed by the prohibitory section, § 12.70.C, which provided:

> PROHIBITION. No person shall cause or permit the establishment, substantial enlargement, or transfer of ownership or control of an Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theater, Massage Parlor or Sexual Encounter Establishment *within 1,000 feet of another such business* or within 500 feet of any religious institution, school or public park within the City of Los Angeles.

Id. at 67a (emphasis added). The language of § 12.70.C, taken together with definitions of the separate terms "Adult Arcade" in § 12.70.B.1 and "Adult Bookstore" in § 12.70.B.2, expressly prohibited the operation of an adult

bookstore *within 1,000 feet* of an adult video arcade. *See id.* at 62a, 67a. The plain language of these provisions thus necessarily prohibited the operation of an "Adult Arcade" *in the same building* as an "Adult Bookstore."

The ordinance, however, also contained a subsection entitled "Measurement of Distance." *Id.* at 67a (§ 12.70.D). This subsection provided guidance for dispersal of adult uses, stating that "[t]he distance between any two adult entertainment businesses shall be measured in a straight line, without regard to intervening structures, from *the closest exterior structural wall of each business*." *Id.* (emphasis added).

Despite the plain language of §§ 12.70.B.1, B.2, and C, which prohibited the operation of an adult arcade within 1000 feet of an adult bookstore, the highlighted language in the measurement of distance subsection led the City Department of Building and Safety to read the ordinance in conflict with the City Council's express intent that bookstores and arcades be separated by at least 1,000 feet. According to a report prepared by the City Planning Department at the request of the City Council's Planning and Environment Committee, "an ambiguity in the present language [of § 12.70.D] . . . has resulted in the Department of Building and Safety interpreting [the distance] provisions in a manner which permits a combination of adult businesses to be established within the exterior structural walls of a single building at one location." J.A. 26.

Once aware of the Building Department's erroneous reading of § 12.70.D, the City Council acted to ensure the effectuation of its intent, as expressed in § 12.70.C, to separate adult uses by the prescribed distances. *See* discussion *supra* at 6-7. First, it enacted a temporary moratorium ordinance, effective March 16, 1982, "prohibiting the establishment of more than one adult entertainment business within the same building or portion thereof." J.A.

26.[7] In March 1983, the Council followed the moratorium with the permanent legislation that is the subject of this case—a zoning prohibition of multiple adult uses within a single building. Pet. App. 70a-75a. Among other provisions, the 1983 ordinance added subsection B.17 to the definitional

[7] The 1982 moratorium ordinance was introduced by a motion made in the City Council on January 20, 1982. The motion noted the "concern on the part of public officials and residents of the City . . . regarding the adverse impacts which result from the continued concentration of adult entertainment businesses." Appellant's Excerpts of Record in the Court of Appeals, No. 98-56200, Vol. 2, at 321. The motion noted that the City had already conducted an extensive study of "whether and to what extent the concentration of such adult entertainment businesses has a blighting and degrading effect upon the neighborhoods in which they are situated." *Id.*

The January 1982 motion specifically noted "a number of instances in which two or more adult entertainment business[es] are being established or maintained in the same building, and [that] the concentration of adult entertainment businesses at a single location may tend to have an adverse impact on the neighborhood in which they are located and *is contrary to the dispersal approach taken by the City in enacting [§ 12.70].*" *Id.* (emphasis added).

This motion led the City Planning Department and the City Attorney to prepare a moratorium ordinance "to prohibit more than one adult entertainment business in a single building on one site." *Id.* at 295. The Planning Department Report of March 4, 1982, drafted in response to the City Council motion of January 20, noted "staff's understanding that the actual intent of the [City] Council in enacting the existing adult entertainment zoning regulations in 1978 was not to permit more than one adult business at one location in a single building." *Id.* The draft moratorium ordinance was also submitted to the Department of Building and Safety, whose misconstruction of the 1978 ordinance had led to the need for legislative clarification. *Id.* at 307. The General Manager of the Building and Safety Department stated that he had "no objection to the Draft." *Id.*

section, § 12.70.B,[8] and a clarifying sentence to the prohibition section, § 12.70.C.[9] *See* Pet. App. 70a-71a.

The 1983 ordinance was specifically designated "[a]n ordinance amending Section 12.70 . . . *to clarify its provisions*." Pet. App. 70a (emphasis added). Section 6, the Statement of Purpose, set out in detail the rationale for the clarification:

> There is concern on the part of public officials and residents of the City of Los Angeles regarding the adverse impacts which result from the continued concentration of adult entertainment business. Based upon this concern, the . . . City Council in 1977 instructed the City Planning Department to conduct a comprehensive study . . . to determine whether and to what extent the concentration of such adult entertainment businesses has a blighting and degrading effect upon the neighborhoods in which they are situated. . . .
>
> . . . .
>
> [Despite the enactment of § 12.70 in July 1978] there have been a number of instances in which *two or more* adult entertainment business[es] have been established or maintained at the same location or operated as a single commercial enterprise. This concentration of adult entertainment businesses tends to have an adverse impact on the neighborhood in which they are located

[8] Subsection B.17 specified that each of the separate adult uses identified in the Definitions section "shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." Pet. App. 71a.

[9] The new language in § 12.70.C provided: "[N]o person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure, or portion thereof, or the increase in floor area of any adult entertainment business in any building, structure or portion thereof containing another adult entertainment business." Pet. App. 71a.

> and is *contrary to the dispersal approach taken by the City in enacting the Adult Entertainment Ordinance.*
>
> The purpose of this ordinance is *to clarify existing provisions of the Adult Entertainment Ordinance.* In enacting this ordinance in 1978, the City Council *did not intend to permit the establishment of more than one adult business in the same building or at the same location.* This ordinance will clarify Council's intent in that regard. . . .

Pet. App. 74a-75a (emphasis added).

B. Procedural History

This action began after a City inspector determined that respondent Alameda Books, Inc., "was operating both an adult bookstore and an adult arcade in the same building" in violation of § 12.70.C. Pet. App. 5a. Respondents Alameda and Highland Books, Inc., another adult business that operated an adult bookstore and video arcade "in the same commercial space within a single building," Pet. App. 41a (internal quotation and citation omitted), then commenced this action under 42 U.S.C. § 1983. Alameda and Highland sought declaratory and injunctive relief to prevent the enforcement of § 12.70.C. *Id.* at 5a.

The evidence relied upon by Alameda and Highland in support of their prayer for relief included declarations of their attorney, G. Randall Garrou, and their president, Steven Wiener. In one of his declarations, Wiener testified that operating a "multiple use" adult store would result in substantially increased retail traffic. "Based upon my many years of managing the operation of adult bookstore businesses," he testified,

> I have . . . developed substantial expertise in understanding the economics of this type of business. It is my opinion that an adult bookstore has a significantly greater chance of succeeding and remaining in operation if, as a part of its business, it operates an adult arcade.

> Similarly, it is my opinion that an adult arcade has a significantly greater chance of succeeding and remaining in operation if such business operates within an adult bookstore.

J.A. 230.[10]

The district court initially denied the parties' cross-motions for summary judgment and set the matter for trial. Pet. 8. Thereafter, the court reconsidered its ruling and granted Alameda and Highland's motion for summary judgment on their First Amendment claim. *Id.* at 9. The court rejected the City's reliance on *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and held that Ninth Circuit precedent required it to grant the plaintiffs' motion for summary judgment. Pet. App. 33a. The court explained that adopting the City's *Renton* arguments "would allow a municipality to regulate speech based on an assertion of harmful secondary effects *without any showing that such secondary effects exist.* Ninth Circuit precedents following *Renton* require a greater showing that *secondary effects actually exist.*" *Id.* (citing *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987)) (emphasis added).

The City appealed the judgment to the Ninth Circuit, which affirmed. Pet. App. 3a. The court of appeals essentially

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[10] On his lawyers' instructions, Wiener declined to address in his declaration "the entirely separate proposition of whether either [a bookstore or a video arcade] *could* in fact theoretically survive except as operated in tandem with the other." J.A. 230. In another declaration, however, Wiener testified that Highland Books "was issued a picture arcade police permit" in January 1987. J.A. 20. From that time until June 1991, "the only 'adult' type of business use at Highland Books was its picture arcade," although Highland also sold "non-adult" items during the same period. *Id.*

The fact that Highland was able to operate a single adult use—an adult arcade—for four and a half years appears to contradict Wiener's later assertion that the City's "only conceivable purpose [for enacting the challenged amendment to § 12.70] would appear to be the attempted destruction of the adult arcade industry." *Id.* at 231-32.

adopted the district court's reasoning that Ninth Circuit precedents, such as *Tollis* and *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000), place a heavier evidentiary burden on States and local governments to justify time, place, and manner regulations of adult businesses than do this Court's precedents. The court cited *Renton* and made one reference to *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). *See* Pet. App. 17a n.7.[11] The court grounded its judgment, however, on its own case law—and on its own exacting evidentiary standard.

The Ninth Circuit began its analysis by characterizing the City's governmental interest solely as "reducing crime in its neighborhoods." Pet. App. 11. *But see id.* at 61a (legislative purposes of § 12.70 are "preserv[ing] the public health, peace, safety, and general welfare . . . [and preventing] the continued erosion of the character of affected neighborhoods"); *see also Renton*, 475 U.S. at 48 (Renton's governmental interests in regulating adult businesses were "to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life'") (quoting Renton ordinance); *Erie*, 529 U.S. at 291 (plurality opinion) (Erie's interests in regulating adult

[11] In footnote 7 of its opinion, the court of appeals observed that the City of Erie, which sought to limit the degree of nudity permissible in an adult bar, "could," in this Court's view, "reasonably rely on the evidentiary foundation set forth in *Renton* and [*Young*]", both of which involved the zoning of adult movie theaters. This was, the court below reasoned, because the nude dancing that was the subject of regulation in *Erie* "was 'of the same character as the adult entertainment at issue'" in *Renton* and *Young*. Pet. App. 17a n.7 (quoting *Erie*, 529 U.S. at 296-97).

The court declined to apply that reasoning in this case, however, paradoxically explaining that "[f]or the purposes of the secondary effects identified in the Los Angeles Study, a solitary bookstore/arcade combination is *hardly of the 'same character'* as a grouping of multiple business establishments in a given geographical area." *Id.* (emphasis added).

businesses addressed "the impacts on public health, safety, and welfare, which we have previously recognized are 'caused by the presence of even one such' establishment.") (quoting *Renton*, 475 U.S. at 50).

The court of appeals then reaffirmed its *Tollis* standard, in which it "established a predicate evidentiary requirement that must be met before we will defer to the judgments of legislative bodies enacting content-neutral time, place, or manner regulations." Pet. App. 14a. The court acknowledged that the 1977 Los Angeles Study found that increased crime results from "concentrations of adult businesses." *Id.* at 11a; *see also id.* at 3a. The court nonetheless held that Los Angeles' multiple use ordinance was invalid because the City had "presented no evidence that a combination adult bookstore/arcade produces any of the harmful secondary effects identified in the Study." *Id.* at 15a.

The court of appeals explained that "[t]he Los Angeles Study examined concentrations of multiple adult business establishments; it did not study the impact of individual establishments in any form, whether as solitary units or as part of the concentration of businesses." *Id.* at 18a. The court did not give any weight to the possibility that concentrations of adult businesses might very well take the form of adult department stores. *Cf. Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 828 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980) (upholding state "multiple use" prohibition on the ground that "[t]he legislature could reasonably have determined that the development of the 'total, under one roof' approach to the marketing of sexually explicit materials and devices tended to produce secondary effects destructive of the general quality of life in the neighborhood").

In the concluding portion of its opinion, the court of appeals made explicit what had thus far been merely implicit—that the evidentiary burden in the States that comprise the Ninth Circuit is more exacting than the standard

articulated by this Court in *Renton* and in the *Erie* plurality opinion.[12] Explaining its disagreement with the Fourth Circuit's holding in *Hart*, the Ninth Circuit stated that "*Hart* was decided before *Renton*; therefore, *there may be some doubt* that it would survive scrutiny under the current Supreme Court's precedent. *We are sure*, however, that the case would not pass muster under our decisions." Pet. App. 20a (citing *Tollis* and *Acorn Invs., Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989)) (emphasis added).

SUMMARY OF ARGUMENT

1. This Court has consistently shown deference to the good faith efforts of municipalities to ameliorate the adverse secondary effects of adult businesses on neighborhoods through the use of the zoning power. There are two fundamental reasons for this deference. First, the Court has repeatedly interpreted the First Amendment to provide, with respect to adult business regulation, that "'society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate.'" *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 n. 2 (1986) (citation omitted).

Second, because adult businesses are frequently creative and resourceful, the Court has deferred to state and local officials to devise appropriate means of addressing secondary effects. States and local governments, the Court has held, "'must be allowed a reasonable opportunity to experiment with solutions to [the] admittedly serious problems" posed to the quality of life in communities by adult businesses. *See id.*

[12] In this respect the court of appeals merely repeated history. In *Renton* the Ninth Circuit had struck down a municipal zoning ordinance regulating adult entertainment uses because of the city's failure to offer "evidence about the effects of adult theaters on Renton." 475 U.S. at 46. This judgment was, of course, reversed by this Court, which held that the Ninth Circuit had "imposed on the city an unnecessarily rigid burden of proof." *Id.* at 50.

at 52 (citation omitted). The Court has been particularly inclined to defer to local elected officials when the means chosen is zoning rather than a ban on speech or expression.

Consequently, the Court has declined to impose a strict evidentiary standard on municipalities called upon to defend zoning ordinances and other adult business regulations from the inevitable First Amendment challenges brought by adult businesses. "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52; *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000) (plurality opinion) (city could rely on other municipalities' evidence of secondary effects of adult theaters to support its regulation of nude dancing establishment).

The Ninth Circuit's analysis and holding are flatly contrary to this Court's precedents; indeed the court of appeals openly acknowledged this fact. *See* Pet. App. 20a (a multiple adult use prohibition upheld by another court of appeals that might be valid under *Renton* would surely be invalidated under the Ninth Circuit's more exacting standard). The court invalidated Los Angeles' 1983 clarification of its 1978 dispersal ordinance because the City did not provide specific evidence of the harmful secondary effects that resulted from the operation of combined bookstores/arcades. This is contrary both to the Court's tradition of deference to reasonable, good faith local solutions to the difficult problems posed by adult businesses, and to the evidentiary standard articulated in *Renton* and followed by the *Erie* plurality. The Ninth Circuit's judgment should therefore be reversed.

2. The evidentiary rule applied by the Ninth Circuit is erroneous because it requires that the citizenry experience the harmful secondary effects generated by adult businesses

before local elected officials can act to deal with them. It is thus contrary to a long line of this Court's cases, including First Amendment cases, that affirm the power of legislatures to base regulatory enactments on predictive judgments. *See, e.g., Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 212 (1997) (*Turner II*); *City of Erie*, 529 U.S. at 297-98 (plurality opinion). "A fundamental principle of legislation is that [the legislature] is under no obligation to wait until the entire harm occurs but may act to prevent it." *Turner II*, 520 U.S. at 212. The court below acknowledged this vital doctrine, *see* Pet. App. 14a (quoting *Jones Intercable, Inc. v. City of Chula Vista*, 80 F.3d 320, 326 (9th Cir. 1996)), only to ignore it.

The Los Angeles City Council is entitled to deference from the federal courts when it makes predictive judgments about the secondary effects of multiple adult uses. This is especially so where, as here, the City Council's judgment was supported not only by reason and common sense, but by a recent and detailed study of the impact of the concentration of adult businesses on the City's neighborhoods. The Ninth Circuit improperly substituted its views for the judgments of the City Council in a crucial area affecting the quality of urban life, and imperiously thrust aside "a valid governmental response to the 'admittedly serious problems' created" by the concentration of adult businesses. *See Renton*, 475 U.S. at 54 (citation omitted). Its judgment should therefore be reversed.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT REQUIRE STATES AND LOCAL GOVERNMENTS TO COMPILE EVIDENCE OF THE ADVERSE SECONDARY EFFECTS OF SPECIFIC ADULT BUSINESSES IN ORDER TO ENACT CONTENT-NEUTRAL ZONING ORDINANCES DESIGNED TO AMELIORATE SECONDARY EFFECTS

Zoning has fairly been described as "the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). As a result, when garden-variety zoning regulations are challenged in the courts, "deference should be given to governmental judgments concerning proper land-use allocation." *Id. See generally Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

State and municipal regulation of adult business, through zoning or other means, is inherently controversial because it is frequently impossible to satisfy all of the conflicting interests involved. The secondary effects that accompany sexually oriented businesses cause deep concern among the citizenry at large—and in the affected neighborhoods in particular—while States and municipalities must also respect the constitutional rights of the purveyors and consumers of these products.[13] For this reason, "[z]oning ordinances currently are the most popular form of regulation of adult entertainment," Jules B. Gerard, *Local Regulation of Adult Businesses: 2001 Edition* vi (2000), because they provide a

[13] As noted at 5-6 & n.6, *supra*, § 12.70.C was purposely crafted to be more protective of the ability of adult businesses to operate than the Detroit dispersal ordinance upon which it was modeled.

means of controlling secondary effects without interfering with the messages adult businesses convey.

At the same time, despite the Pavlovian prognostications of doom invariably raised by adult business owners in response to state or local regulation, *see, e.g.*, 10-11 & n.10, *supra* (Wiener testimony), "[t]he number of adult businesses and the quantity of adult entertainment on the market has increased explosively over the past three decades." Gerard, *Adult Businesses: 2001 Edition*, § 1.02, at 2. "Bookstores, television film rental outlets, and movie theaters" are now to be found "in virtually all communities." *Id.* at v.

Because adult entertainment establishments frequently have undesirable secondary effects on the surrounding neighborhoods, state, local, and federal officials throughout the country have, at the urging of citizens, taken measures to ameliorate those effects.[14] Given the variety and number of sexually oriented businesses, as well as differences in the configurations of municipalities, there is obviously no "one size fits all" solution to the problem of secondary effects of adult entertainment establishments.

Consequently, this Court has consistently shown deference to the good faith efforts of individual local governments to ameliorate this burgeoning but essentially insoluble problem. There are two principal reasons for this deference.

First, the Court has repeatedly interpreted the First Amendment to provide, in the context of adult business regulation, that "'society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate.'" *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 n.2 (1986) (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50,

[14] *See, e.g.*, Ray Glier, *Gold Club Trial Set to Begin in Atlanta*, Washington Post, May 14, 2001, at A2 (describing federal criminal prosecution of adult entertainment establishment, with charges including prostitution, extortion, fraud, and racketeering).

70 (1976) (plurality opinion)); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion) ("nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection") (collecting cases).

Second, as the facts of this case suggest (*see* discussion at 10-11, *supra* (Wiener testimony), the owners and operators of adult businesses are creative and resourceful. The Court has accordingly deferred to state and local elected officials to devise constitutionally permissible—but effective—ways of addressing the secondary effects of sexually-oriented businesses, including crime and the blighting of neighborhoods. "As a majority of this Court recognized in [*Young*], 'a city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect."'" *Renton*, 475 U.S. at 50 (quoting *Young*, 427 U.S. at 71, and *id.* at 80 (Powell, J., concurring)).

Thus, "[c]ities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. 'It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas.'" *Id.* at 52 (quoting *Young*, 427 U.S. at 71 (plurality opinion)). States and local governments, the Court has held, "'must be allowed a reasonable opportunity to experiment with solutions to [the] admittedly serious problems'" posed for communities by adult businesses. *Id.* (quoting *Young*, 427 U.S. at 71 (plurality opinion)). As zoning and licensing cases such as *Renton*, *Young*, and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), demonstrate, the Court has been most deferential to political decision-makers when regulations other than bans are employed.

This Court's willingness to defer to the decisions of local legislatures in the matter of the regulation of adult businesses—and its related unwillingness to obstruct good

faith efforts to regulate by the judicial imposition of onerous evidentiary burdens—is reflected in a long line of cases. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), which involved the related problem of a state prohibition of the public showing of obscene films, the Court dismissed the argument that the State had failed to offer adequate evidence to sustain its laws because, according to petitioner, "there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women." *Id.* at 60. To this the Court responded: "We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, except in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution." *Id.*

Five years later, in *Young*, the Court considered the validity of a city's decision to enact a dispersal ordinance to ameliorate the secondary effects of theaters "which exhibit sexually explicit 'adult' movies." 427 U.S. at 52. The Detroit Common Council had determined that the best way to balance the competing interests of theaters and their patrons, on the one hand, and the community at large, was to zone for the dispersal of adult theaters rather than allowing them to concentrate in particular neighborhoods.

The Detroit zoning ordinance, which served as a model for the Los Angeles zoning ordinance in this case, was adopted in 1972 in response to the increase in the number of adult theaters from two in 1967 to 25 in 1972. It provided that "an adult theater may not be located within 1,000 feet of any two other 'regulated uses' or within 500 feet of a residential area."[15] 427 U.S. at 52 & n.2. The adult use ordinance was

[15] As discussed *supra* at 5 & n.6, however, "[d]ue to the predominance of commercial zoning in 'strips' along major and secondary streets" in Los Angeles, J.A. 40, the City did not adopt the Detroit ordinance wholesale. Instead, it tailored its ordinance to avoid "limit[ing] the potential locations for such businesses rather severely." *Id.*

supported by the Detroit Common Council's determination that "a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime," *id.* at 71 n.34 (plurality opinion), and that such secondary effects "are not attributable to theaters showing other types of films." *Id.*

Although the Court's judgment upholding the ordinance was not supported by a single rationale, five Justices agreed that the Detroit dispersal ordinance was permissible under the First Amendment. *See id.* at 63-73 (plurality opinion); *id.* at 73-84 (Powell, J., concurring). Justice Stevens wrote an opinion for the four-Justice plurality in which he stated:

> It is not our function to appraise the wisdom of [the city council's] decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Id. at 71.

Ten years later the *Renton* Court revisited the issue of the constitutionality of a zoning ordinance creating dispersal rules for adult theaters.[16] But now the rationale for the judgment upholding the ordinance was expressed in a majority opinion on behalf of six Justices, who adopted much of the reasoning of the *Young* plurality.[17] The *Renton* Court took particular pains to reject the Ninth Circuit's view that the ordinance was invalid because it had been enacted "without the benefit of studies specifically relating to 'the particular problems or needs of Renton.'" 475 U.S. at 50 (quoting 748

[16] The Renton zoning ordinance "prohibit[ed] adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school." 475 U.S. at 43.

[17] An additional Justice concurred in the result. *See* 475 U.S. at 55 (Blackmun, J., concurring).

F.2d at 537). "We think," the Court said, "the Court of Appeals imposed on the city an unnecessarily rigid burden of proof." *Id.*

Renton had "relied heavily on the experience of, and studies produced by, the city of Seattle," where "the adult theater zoning ordinance was aimed at preventing the secondary effects caused *by the presence of even one such theater in a given neighborhood.*" *Id.* (emphasis added). In addition, the Court held, Renton had properly relied upon the opinion of the Washington Supreme Court upholding the Seattle adult use ordinance. *See id.* at 50-51 (citing and quoting *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153 (Wash. 1978)).

The *Renton* Court ruled that there was an adequate basis for the city's ordinance even though Renton had done no studies of its own. "The First Amendment," the Court reasoned, "does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52. The Court also reaffirmed the fundamental principle that the choice of method for addressing secondary effects lies first and foremost with state and local legislatures, not with the courts. "Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton." *Id.* at 52.

In *FW/PBS*, adult business owners challenged Dallas' licensing scheme for a wide range of "sexually oriented businesses." 493 U.S. at 220-21.[18] One provision of the

[18] The Dallas ordinance upheld in *FW/PBS*, like the Los Angeles ordinance challenged here, prohibited multiple adult uses in a single location. *See Randall v. City of Dallas*, 648 F. Supp. 1061, 1066 n.14 (N.D. Tex. 1986) ("there may not be more than one sexually oriented business 'in the same building, structure, or portion thereof'") (citing and quoting Dallas City Code § 41A-13(c)), *aff'd*, 837 F.2d 1298 (5th Cir. 1988), *aff'd in part and rev'd in part sub nom. FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

ordinance classified as "sexually oriented businesses" motels "that rent rooms for fewer than 10 hours." *Id.* at 236 (citing Dallas City Code § 41A-18(a)). The motel owners challenged this classification under the Due Process Clause, arguing that "the city had an insufficient factual basis on which to conclude that rental of motels for fewer than 10 hours produced adverse impacts." *Id.* They specifically asserted that "the council had before it only [the 1977 Los Angeles Study] that considered cursorily the effect of adult motels on surrounding neighborhoods." *Id.*

Although some portions of the *FW/PBS* decision commanded fewer than a majority of Justices, six members of the Court joined to reject this evidentiary argument. The Court based its holding largely on judicial notice and common sense. The court of appeals, this Court approvingly noted, had "thought it reasonable to believe that shorter rental time periods indicate that the motels foster prostitution and that this type of criminal activity is what the ordinance seeks to suppress." *Id.* (citing 837 F.2d at 1304). The Fifth Circuit therefore ruled that "no more extensive studies were required than those already available." *Id.*

This Court agreed with the Fifth Circuit's analysis, holding that "the reasonableness of the legislative judgment, combined with the Los Angeles study, is adequate to support the city's determination that motels permitting room rentals for fewer than 10 hours should be included within the licensing scheme." *Id. Cf. Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion) (upholding against a First Amendment challenge a state restriction on solicitation of votes on Election Day on basis of "[a] long history, a substantial consensus, and simple common sense").

Most recently, *City of Erie* upheld a municipal ban on total nudity in establishments offering live adult entertainment. Disagreeing with the dissenting Justices' view that the city ordinance constituted a "total ban," *see* 529 U.S. at 319 (Stevens, J., dissenting), the *Erie* plurality responded that the city had not sought to interfere with the dancers' expression. Rather, "[i]n trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and other deleterious effects caused by the presence of such an establishment in the neighborhood." 529 U.S. at 293. In response to the dissent's contention that requiring dancers to wear minimal covering was a "total ban" on expression, the plurality stated: "If States are to be able to regulate secondary effects, then [such] *de minimis* intrusions on expression . . . cannot be sufficient to render the ordinance content based." *Id.* at 294 (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).[19]

As for the evidentiary showing required to support the ordinance banning totally nude live entertainment, the *Erie* plurality relied upon the *Renton* standard. *See* 529 U.S. at 296. It concluded that "Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that *secondary effects are caused by the presence of even one adult entertainment establishment in a*

[19] The *Erie* plurality also rejected the respondent's suggestion that the ordinance was the product of an "illicit motive" on the part of the City Council. "As we have said before," Justice O'Connor wrote, "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." 529 U.S. at 292 (plurality) (citing *United States v. O'Brien*, 391 U.S. 367, 382-83 (1968)). *O'Brien* held that "'[t]he decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.'" 391 U.S. at 383 (quoting *McCray v. United States*, 195 U.S. 27, 56 (1904)).

given neighborhood." *Id.* at 297 (emphasis added). The *Erie* plurality thus applied a deferential evidentiary standard in finding reasonable Erie's reliance on evidence concerning the harmful secondary effects of adult movie theaters to support its determination to ban nude dancing in an adult bar.

As the foregoing cases make clear, the Ninth Circuit erred in imposing on Los Angeles an unnecessarily rigid evidentiary burden to support an ordinance that simply reaffirmed the City Council's then-recent prohibition of "multiple adult uses." *See* discussion *supra* at 6-10. The Ninth Circuit struck down the City's 1983 ordinance because of its failure to provide specific evidence of the harmful secondary effects of the operation of combined adult bookstores/video arcades. The court repeatedly expressed its view that the City's reliance on the 1977 Los Angeles Study, which supported the 1978 ordinance that was legislatively clarified in 1983, was insufficient. *See, e.g.*, Pet. App. 15a ("Like the County in *Tollis*" which presented no evidence of any kind, 827 F.2d at 1333, "Los Angeles has presented no evidence that a combination bookstore/arcade produces any of the harmful secondary effects identified in the [Los Angeles] Study.").[20]

The Ninth Circuit invalidated the City's zoning ordinance despite this Court's precedents that give state and local governments wide latitude in dealing with the difficult quality of life problems posed by adult businesses. It flouted the evidentiary rule announced in *Renton* and reaffirmed in subsequent cases, with which it expressly disagreed. *See* Pet.

[20] It is ironic that the Ninth Circuit deemed Los Angeles' reliance on its comprehensive study of the secondary effects of the concentration of adult businesses to be insufficient, when other courts, including this Court, have upheld adult business ordinances based in part upon this same 1977 Los Angeles Study. *See FW/PBS*, 493 U.S. at 236; *Buzzetti v. City of New York*, 140 F.3d 134, 136 (2d Cir.), *cert. denied*, 525 U.S. 924 (1998); *Excalibur Group, Inc. v. City of Minneapolis*, 116 F.3d 1216, 1218 n.2 (8th Cir. 1997), *cert. denied*, 522 U.S. 1077 (1998); *Hart*, 612 F.2d at 829 n.10.

App. 20a (stating that a North Carolina multiple use statute that might "survive scrutiny under the current Supreme Court's precedent" would surely "not pass muster under our decisions in *Tollis* and *Acorn*").

Finally the Ninth Circuit ruled against the City even in the face of the admission of the owner of Alameda and Highland that combining the sale of adult books and video arcades in a single location "significantly" increases profitability and economic viability of the establishment. *See* J.A. 230 (Wiener testimony). Wiener's self-described "expert" testimony, *see id.*, necessarily refers to the higher sales volume, traffic, and, inevitably, secondary effects, that result from combining adult uses in a single location. This "'total, under one roof' approach to the marketing of sexually explicit materials," *see Hart*, 612 F.2d at 828, would require cities to permit sexual department stores, with each floor dedicated to a separate adult use. *Cf.* Pet. App. 62a-64a (L.A.M.C. § 12.70.B) (identifying variety of separate adult uses under City Code).[21] In the short-run, of course, there would inevitably be an exponential growth in the number of combined bookstore/arcades in Los Angeles (and elsewhere), each one, according to Wiener's expert testimony, resulting in a significant increase in retail traffic. *See Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994); J.A. 8 (Declaration of G. Randall Garrou, Esq.) (plaintiffs in *Topanga* consisted of 22 adult businesses challenging the constitutionality of Los Angeles' multiple use ordinance); *see also id.* at 9 (refer-

[21] Having made the legislative determination to prohibit more than one adult use in a building, the Constitution does not require the City to draw lines among the number of permissible uses—to allow, for example, two uses, but to prohibit three or four. This is precisely the sort of line drawing that this Court has repeatedly recognized must be left to legislatures, not to courts. *See Renton*, 475 U.S. at 52 (citing *Young*, 427 U.S. at 71 (plurality opinion)).

encing additional adult businesses seeking to operate multiple uses in Los Angeles).

Under this Court's cases it is clear that Los Angeles acted constitutionally in enacting the 1983 clarifying ordinance based upon the 1977 Study. Because the Ninth Circuit imposed upon Los Angeles an unreasonable evidentiary burden for zoning of adult businesses that ignores the legal standards and reasoning of this Court, its judgment should be reversed.

II. UNLESS REVERSED, THE NINTH CIRCUIT'S HOLDING WILL REQUIRE THE CITIZENRY TO SUFFER THE SECONDARY EFFECTS OF ADULT BUSINESSES BEFORE GOVERNMENTAL ACTION CAN BE TAKEN, AND WILL PREVENT STATE AND LOCAL LEGISLATURES FROM ACTING ON THE BASIS OF REASONABLE PREDICTIVE JUDGMENTS

Unless reversed, the Ninth Circuit's evidentiary standard will inflict immediate harm on the citizens of Los Angeles, who will be subjected to the invidious secondary effects of adult businesses. Mr. Wiener, the experienced purveyor of sexually explicit books and videotapes, will meanwhile be spared the inconvenience and expense of opening separate retail premises for his adult bookstores and video arcades. *See* J.A. 20, 230.

Such a result is contrary to the First Amendment, which does not create a "right" to the most profitable means of operating an adult bookstore or arcade. As the Court put it in *Renton*, "we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." 475 U.S. at 54. "The question of purely economic injury is not relevant to the issue of whether a moving party faces hardship if a restrictive zoning ordinance is enforced." *Topanga Press*, 989 F.2d at

1528 (citing *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984)).

By requiring Los Angeles to proffer—in advance of enacting a zoning ordinance—highly specific evidence of the secondary effects that result from the precise adult business activity in question, the Ninth Circuit has disregarded settled First Amendment doctrine and denied the City "'a reasonable opportunity to experiment with solutions to admittedly serious problems.'" *Renton*, 475 U.S. at 52 (quoting *Young*, 427 U.S. at 71). It has admonished municipalities that the Constitution prohibits them from engaging in good faith regulation of adult businesses to ameliorate secondary effects unless and until municipal officials have documented the precise secondary effects that flow from the specific uses in question—in this case, the operation of an adult bookstore together with an adult video arcade.

The Ninth Circuit has, in short, held that the citizenry must first experience the harms before federal courts will permit reasonable ameliorative zoning. Not only is this flatly contrary to the Court's precedents concerning the regulation of adult business, discussed above, it is contrary to a long line of cases, including First Amendment cases, that affirm the power of legislatures to base regulatory enactments on predictive judgments. Ironically, even the court below acknowledged this rule of law, only to ignore it. The court expressly noted that under this Court's teachings as well as its own cases, courts are to "'"accord substantial deference to the predictive judgments'" of legislative bodies when analyzing content-neutral regulations that burden speech." Pet. App. 14a (quoting *Jones Intercable, Inc. v. City of Chula Vista*, 80 F.3d 320, 326 (9th Cir. 1996) (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (*Turner I*))).

The rationale for this rule is clear, compelling, and fully applicable to this case. "A fundamental principle of legislation is that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it." *Turner*

Broadcasting System, Inc. v. FCC, 520 U.S. 180, 212 (1997) (*Turner II*). This principle is particularly applicable to content-neutral time, place, and manner regulations, which "do not pose the same 'inherent dangers to free expression' that content-based regulations do, and thus are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution." *Id.* at 213 (quoting *Turner I*, 512 U.S. at 661).

Just last term *City of Erie* applied these principles to uphold municipal regulation of a sexually oriented business. Justice O'Connor wrote for a four-Justice plurality that "[t]he city council members, familiar with commercial downtown Erie, are the individuals who would likely have had first-hand knowledge of what took place at and around nude dancing establishments in Erie, and can make particularized, expert judgments about the resulting harmful secondary effects." 529 U.S. at 297-98 (plurality).[22] And, she continued, "[a]nalogizing to the administrative agency context, it is well established that, as long as a party has an opportunity to respond, an administrative agency may take official notice of such 'legislative facts' within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment." *Id.* at 298 (citations omitted).

The Los Angeles City Council, like the Erie City Council, is entitled to deference from the federal courts when it makes predictive judgments about secondary effects of multiple adult uses—all the more so when those predictive judgments are supported not only by reason and common sense, but by a recent and detailed study of the impact of adult businesses on

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[22] The preamble to the challenged adult business ordinance stated that "the Council of the City of Erie has, at various times over more than a century, expressed its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution, and other serious criminal activity." 529 U.S. at 297 (plurality).

the City. The clarifying ordinance struck down by the Ninth Circuit contains a lengthy statement of the City Council's rationale for its enactment, including "the adverse impacts which result from the continued concentration of adult entertainment business" and the Council's finding that "a number of instances in which two or more adult entertainment business[es] have been established or maintained at the same location . . . tends to have an adverse impact on the neighborhood in which they are located and is contrary to the dispersal approach taken by the City" in enacting §12.70 just a few years before. Pet. App. 74a-75a. Moreover, the City published a notice of public hearing, made its complete file on the proposed ordinance available for public inspection, and held a public hearing on the "proposed ordinance to amend the [City] Code by prohibiting the establishment of more than one adult entertainment business in the same building or structure." Excerpts of Record in Court of Appeals, No. 98-56200, Vol. 2, at 347-48.

The Ninth Circuit improperly substituted its views for those of the City Council, which had plainly engaged in a diligent, open, and good faith effort to ameliorate the secondary effects of the concentration of adult businesses resulting from multiple uses. The court below imperiously thrust aside "a valid governmental response to the 'admittedly serious problems'" created by concentrations of sexually oriented adult businesses, *Renton*, 475 U.S. at 54 (citation omitted), in open disregard of this Court's precedents and to the detriment of the citizens of Los Angeles who must live with the consequences. Unless reversed by this Court, its judgment will stand as a major obstacle to reasonable, good faith zoning of adult entertainment businesses.

CONCLUSION

The judgment of the court of appeals should be reversed.

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May 15, 2001

Supreme Court, U.S.
FILED
MAY 15 2001
CLERK

MAY 15, 2001

(10)

No. 00-799

In the Supreme Court of the United States

THE CITY OF LOS ANGELES,
Petitioner,

v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF OHIO AND 24 STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI

Ohio and 24 other *Amici* States write to urge the Court to reverse the judgment of the Ninth Circuit Court of Appeals. At stake is the ability of States and their subdivisions to effectively regulate serious secondary effects—including drops in property values, increases in crime, and general urban blight—associated with adult businesses. *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 55 (1976). In reliance on the holdings in *Young* and *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986), hundreds—perhaps thousands—of local governments have enacted statutes and ordinances restricting adult businesses because of their secondary effects.

The Ninth Circuit Court of Appeals has turned on its head the evidentiary requirement for governments regulating these blighting secondary effects. If upheld, the Ninth Circuit's interpretation will gut any realistic attempt by local government to control the concentration of adult businesses by appropriate time, place and manner restrictions, and put a disproportionate burden on the smallest governments.

The States and their subdivisions have an obvious interest in "attempting to preserve the quality of urban life," by appropriate regulation of businesses that have demonstrated adverse secondary effects. 475 U.S. at 50; 427 U.S. at 71. In particular, the States have an interest in supporting the smallest subdivisions in their ability to regulate the damaging secondary effects of adult entertainment businesses. The *Amici* States therefore submit this brief for the Court's consideration.

SUMMARY OF ARGUMENT

a. The Court in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), held that the amount of evidence necessary to satisfy heightened scrutiny under the First Amendment "will vary up and down with the novelty and plausibility of the justification raised." The government justification for regulation of protected activity in this case—the adverse secondary effects of adult businesses—is of similar age and pedigree to that supported in *Nixon*.

A large body of evidence undeniably establishes a link between adult businesses and undesirable secondary effects, placing the justification for regulation of adult businesses in the same category as the justification in *Nixon*—"neither novel nor implausible." 528 U.S. at 391. *Renton* correctly—and consistently with *Nixon*—allows reliance on evidence from elsewhere to justify regulation of adult establishments.

The Los Angeles amendment at issue here is a minor variation on the regulations upheld in *Renton* and *Young*, and Los Angeles relied on evidence cited in other cases upholding similar laws, as well as its own study demonstrating the adverse effects of a concentration of adult businesses. No evidence beyond that in the record here is constitutionally necessary to justify the ordinance.

b. Not only are the holdings in *Renton* and *Young* consistent with the Court's First Amendment jurisprudence, but they represent the only realistic approach for small local governments to the "admittedly difficult problem" created by adult entertainment establishments.

Renton allows small governments to rely on evidence of secondary effects from elsewhere to justify

regulation of adult businesses. *Renton* and *Young* also accord considerable deference to local government, which "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." 427 U.S. at 71; 475 U.S. at 52. *Renton* also permits a local government to act preemptively, by regulating before an adult business has been established. 475 U.S. at 52.

Thus, under the *Renton-Young* model, even the smallest local governments can realistically pass laws that are aimed at controlling the blighting secondary effects of adult businesses, and are reasonably tailored to local conditions. Indeed, in reliance on the holdings in *Renton* and *Young*, numerous local governments, including States, municipalities and unincorporated townships have enacted zoning laws similar to the ordinances in *Renton* and *Young*, and each of those local regulations is designed to "preserve[] the character of . . . neighborhoods [and] the quality of urban life." 427 U.S. at 71.

Most small local governments simply cannot afford to conduct their own studies establishing the secondary effects caused by various types of adult business establishments. In addition, local governments frequently need to deal with local problems by tailoring their laws to local conditions.

The Ninth Circuit's holding eviscerates the *Renton-Young* paradigm and forces small governments into "big city" solutions. Even the reliance on other localities' experience is in question because the Ninth Circuit disallowed Los Angeles's reliance on the evidence presented in cases from other circuits, even those upholding laws very similar to the amendment at issue. Because of this, the decision below implies that local governments cannot regulate preemptively.

Most disturbing of all, the ultimate result of the Ninth Circuit's decision may be to drive adult businesses out of large cities that can afford studies and therefore are permitted to pass zoning ordinances, into suburban and rural areas that cannot. Any exodus of adult businesses into small towns will increase political pressure on States to solve a quintessentially local problem on a state-wide basis.

ARGUMENT

A. The Evidence In The Record Presented Here Goes Well Beyond What is Constitutionally Necessary To Satisfy Heightened First Amendment Scrutiny.

Just two terms ago, in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Court held that the amount of evidence necessary to satisfy heightened scrutiny under the First Amendment "will vary up and down with the novelty and plausibility of the justification raised." 528 U.S. at 391. In *Nixon*, the justification for regulation of campaign contributions was that first articulated in *Buckley v. Valeo*, 424 U.S. 1 (1976), and now well-recognized—the prevention of corruption and the appearance of corruption. Because the justification is by now so well-documented, the Court looked only to see that "the substantiation of the congressional concerns reflected in *Buckley* [had] its counterpart supporting the Missouri law," 528 U.S. at 393-95. However, the Court found that the Missouri law was well-supported, and did not "requir[e] further definition of" the State's evidentiary burden. *Id.*

The government justification for regulation of protected activity in this case—the secondary effects of adult businesses first supported in *Young*—is of virtually identical vintage and pedigree to that supported in

Buckley and *Nixon*. Indeed, there is hardly a proposition more familiar and more well-documented than that adult businesses engender undesirable secondary effects and therefore justify zoning regulations.

Aside from the evidence referred to in *Renton* and *Young*, a number of cases cite studies and other evidence that undeniably establish a link between adult businesses and undesirable secondary effects. In particular, *Buzzetti v. City of New York*, 140 F.3d 134 (2nd Cir. 1998), and *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994), catalog numerous studies that unquestionably demonstrate the link between adult businesses and undesirable secondary effects. The Eighth Circuit went so far as to hold that regulations aimed at minimizing secondary effects of adult businesses serve a substantial governmental interest "as a matter of settled law." *Excalibur Group, Inc. v. City of Minneapolis*, 116 F.3d 1216, 1220 (8th Cir. 1997). *See also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 236-37 (1990); *Thames Enterprises, Inc. v. City of St. Louis*, 851 F.2d 199 (8th Cir. 1988); *Z.J. Gifts D-2 L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998).

In short, as was true of the justifications for the campaign regulations in *Nixon*, the justifications for the adult business restrictions here are "neither novel nor implausible." 528 U.S. at 391. Although the *Nixon* Court found it unnecessary to define the minimal "quantum of evidence" needed to support the regulations in that case, a law that restricts adult entertainment establishments surely requires minimal evidentiary support beyond the substantial body of case law and studies demonstrating the link between adult businesses and adverse secondary effects.

Renton correctly—and consistently with *Nixon*[1]—allows reliance on evidence from elsewhere to justify regulation of adult establishments. In *Renton*, the Court allowed a small Washington municipality to rely on a study of the adverse "secondary effects" of adult businesses in Seattle, and a Washington Supreme Court case describing Seattle's experience with adult businesses. 475 U.S. at 50-51 (citing *Northend Cinema v. Seattle*, 90 Wash.2d 709 (1978)). Especially significant, the *Renton* Court held that local governments need not "conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52. In addition, the Court held in both *Young* and *Renton* that "the City must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." 427 U.S. at 71; 475 U.S. at 52.

The Los Angeles amendment at issue here is a minor variation on the regulations upheld in *Renton* and *Young*. It is supported not only by the body of case law referred to above, but also by the City's own extensive study, which formed the basis for the original ordinance. Indeed, the amendment merely furthers the primary intention of the original ordinance—prevention of the concentration of adult establishments.

In addition, Los Angeles relied on cases from other jurisdictions with similar laws. For instance, in *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), the Fourth Circuit upheld a state law "almost identical to

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[1] *Nixon* has been characterized as "consistent with the approach earlier applied in *Young* [] and *Renton* []." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 312 (2000) (Souter, J., concurring in part and dissenting in part).

the Los Angeles ordinance." Pet. App. at 19. In addition, the Eighth Circuit in *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994), upheld a similar law.

Respondent's argument that the amendment is really aimed at preventing a single business from offering multiple services is a distinction without a difference. Taken to its logical conclusion, Respondent's reasoning would permit the creation of adult "department stores" with numerous adult services provided under the same large roof, all operated as a single "business." This allows exactly what the ordinance is designed to prevent, and exactly what the 1977 study and other studies have demonstrated brings adverse effects: the concentration of several adult entertainment establishments in a small area, whether they comprise one business entity or many.

In short, no evidence beyond that in the record here is constitutionally necessary to justify the ordinance, and it should be upheld for that reason alone.

B. The Evidentiary Burden Established By *Renton* and *Young* Is The Only Realistic Approach For Small Local Governments When Regulating The Adverse Secondary Effects Of Adult Businesses.

Not only are the holdings in *Renton* and *Young* consistent with the Court's First Amendment jurisprudence, but they represent the only realistic approach for small local governments to the "admittedly difficult problems" created by adult entertainment establishments. 475 U.S. at 54; 427 U.S. at 71. Numerous small governments have reasonably passed laws in reliance on the *Renton-Young* scheme, and it should be preserved.

As explained above, *Renton* allows small governments to rely on evidence of secondary effects from elsewhere to justify regulation of adult businesses. Perhaps even more significantly, both *Renton* and *Young* hold that considerable deference will be accorded a local government as to the exact remedy employed. 427 U.S. at 71; 475 U.S. at 52.

And *Renton* also implies that governments may regulate preemptively. The *Renton* Court upheld the ordinance at issue there even though the City did "not, at the present time, have any business whose primary purpose [was] the sale, rental or showing of sexually explicit materials." 475 U.S. at 52.

Thus, under the *Renton-Young* model, even the smallest local governments can realistically pass laws that are aimed at controlling the blighting secondary effects of adult businesses, and are reasonably tailored to local conditions. By relying on studies and other evidence from elsewhere about the adverse secondary effects of those businesses, and by developing reasonable local solutions, even a small municipality can pass an effective but constitutional adult business zoning ordinance, and can do so before the businesses move in.

In reliance on the holdings in *Renton* and *Young*, hundreds—perhaps thousands—of local governments, including States, large and small municipalities and even unincorporated townships have enacted a variety of laws intended to regulate adult businesses to "preserve[] the character of . . . neighborhoods," and "preserve the quality of urban life." 427 U.S. at 71.

Although usually considered an exclusively local or municipal problem, a significant number of States have enacted either laws zoning adult businesses directly, or permitting political subdivisions to do so. For instance,

Delaware has a comprehensive, State-wide statute that regulates adult businesses, including zoning. Del. Code Ann. tit. 24 §§1601-1635 (Delaware Adult Entertainment Establishments Act). Other States allow their subdivisions to pass such laws. *See, e.g.*, Arizona Rev. Stat. Ann. tit. 11 § 11-821 (B)(5). A list of similar State statutes is provided in the Appendix.

However, the regulation of adult businesses still remains largely a local concern. The Appendix contains a non-exhaustive sampling of ordinances zoning adult businesses from numerous cities, towns, boroughs, counties and other large and small local governments.

Many cities and small villages have passed zoning laws similar to the ordinances at issue in *Renton* and *Young*. Most of these small local governments simply cannot afford to conduct their own studies establishing the secondary effects caused by various types of adult business establishments. By practical necessity, they must be allowed to rely largely on studies performed elsewhere to support their laws.

In addition, local governments frequently need to deal with local problems by tailoring their laws to local conditions. The best-known example of this is the one discussed in *Renton* itself, where the Court explained that some localities "may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton." 475 U.S. at 52. And, as in *Renton*, local governments may want to act preemptively, by enacting zoning laws before adult businesses appear.

The Ninth Circuit's holding eviscerates the *Renton-Young* paradigm and throws into doubt zoning laws all over the country. The Ninth Circuit unrealistically requires, not just evidence "reasonably believed to be relevant to the problem," but precise

evidence that the specific types of adult businesses sought to be regulated directly cause unwanted secondary effects. Pet. App. at 14-16. Thus, rather than relying on the well-documented general proposition that adult businesses create undesirable secondary effects, even the smallest municipality will have to independently justify the regulation of each specific type of adult business listed in its code. The Ninth Circuit regime is difficult enough for Los Angeles, which will have to pay for another expensive study. If followed here, that same approach will make it nearly impossible for small municipalities to pass appropriate laws.

Even liberally construed, the decision below forces small governments into "big city" solutions, no matter how inappropriate. A small town would have to adopt the exact solution chosen by some other locality that was able to pay for an exacting study of the adverse effects caused by specific adult businesses—inevitably a big city.

Indeed, even the reliance on other localities' experience is in question under the Ninth Circuit's approach. The Ninth Circuit did not allow Los Angeles to rely on the evidence presented in cases from other circuits, even those that upheld similar laws. Most notably, the court below rejected the evidence presented in *Hart Book Stores,* which upheld a state law "almost identical to the Los Angeles ordinance," and *ILQ Investments,* which likewise upheld a similar law. Pet. App. at 18, 19-20.

Because reliance on evidence from other localities is questionable, the Ninth Circuit decision prevents preemptive zoning. Before they can regulate, small governments will have to allow particular adult businesses to establish themselves, in order to study them and determine whether they engender adverse secondary effects. And, once allowed, such businesses might have to

be "grandfathered" in under any zoning law ultimately passed. *See, e.g.* Ohio Revised Code §713.15 (Retroactive Zoning Ordinances Prohibited).

Most disturbing of all, the ultimate result of the Ninth Circuit's scheme may be to drive adult businesses out of large cities that can afford studies and therefore are permitted to pass zoning ordinances, into suburban and rural areas that cannot. Without the regime established by *Renton* and *Young*, small local governments may be helpless to control the secondary effects of concentrations of adult businesses.

Any exodus of adult businesses into small towns will increase political pressure on States to solve a quintessentially local problem on a state-wide basis. State governments that have previously decided to allow localities to control zoning may feel pressure to pass state-wide legislation. Or States may be called on to provide financial support for conducting numerous costly studies so their political subdivisions can justify various zoning ordinances.

In short, the Ninth Circuit scheme may inappropriately and unnecessarily force some States to shoulder the burden of studying and regulating a local problem, thus diverting funds from other vital State interests.

CONCLUSION

For the foregoing reasons, the *Amici* States respectfully urge the Court to reverse the judgment of the court of appeals.

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May, 2001

ADULT BUSINESS ZONING LAWS

State-Wide Laws

Alabama

Ala. Code 1975 § 13A-12-200.5 (Material harmful to minors)

Arizona

A.R.S. §11-821 (County plan)

Delaware

24 Del. C. §§ 1602, 1610 (Adult Entertainment Establishments; License tied to physical location)

Georgia

O.C.G.A §36-60-3 (Restriction of adult bookstores and movie houses to certain areas)

Illinois

55 ILCS 5/5-1097.5; 65 ILCS 5/11-5-1.5 (adult entertainment facility)

Nevada

NRS 278.022 and 278.0222 (Restriction of adult motion picture theaters and bookstores)

New Jersey

N.J.S.A. 2C:34-7 (Sexually oriented businesses; restrictions on location and display of signs)

Ohio

O.R.C. 503.53 (Townships – Duty to obtain permit – prohibitions (adult cabarets))

Oklahoma

11 Okl. St. § 22-109.1 (Location of adult novelty shops)

Large Cities (by State)

Alabama

Mobile (Chpt. 64, Zoning, Section 64.4, Supp. Regs.)

Arizona

Tuscon (Part II, Chpt. 7, Businesses Regulated, Art. X, Adult Entertainment Enterprises and Establishments, Section 7-211)
Yuma (Section 154-005, Adult Oriented Businesses)

Florida

Jacksonville (Chpt. 150 Adult Entertainment, Chpt. 656 Zoning Code)

Orlando (58.700 Adult Entertainment Facilities, Purpose of regulation 58.702 Dispersal of Facilities)

Tampa (27-523 Zoning-Definitions)

Indiana

Indianapolis (Municipal Code Section 732-216, Special Regulations, Adult Entertainment Business)

Kentucky

Covington (Section 158.106, Covington Zoning Code)

Louisiana

New Orleans (Art. I, Gen. Provisions, Section 1.10, Adult Establishments)

Maryland

Hagerstown (Part II, General Legislation, Chpt. 68, Zoning, Art. I, Regs. and Restrictions, Section 68-17.C2, District)

Mississippi

Jackson (Zoning Ordinance of the City of Jackson, Sections 202 and 802.01.1-8, 802.01.2-2.)

Vicksburg (Ordinance 93-37, Part I, Zoning).

Minnesota

Bloomington (Art. VIII, Anti-Blight Regulations, sec. 19.84, Zoning Regulations)

Minneapolis (Title 20, Zoning Code, sec. 549.350, Sexually Oriented Uses)

Nevada

Reno (City Ordinance Nos. 1806.300 and 1806.304)

New Mexico

Albuquerque (Section 14-16-2-22, Special Use Zone)

Nevada

North Las Vegas (Title 17, Zoning, Chapter 17,24, General Building and Development Standards, Section 17.24.190, Sexually Oriented Businesses)

Ohio

Columbus (Title 33, Zoning Code, Chpt. 3389, Special Permit Uses, Section 2289.10, Adult Entertainment)

Tennessee

Nashville (Title 17, Zoning, Chpt. 17.36, Overlay Districts, Section 17.36.260, Locational Standards)

Texas

El Paso (Title 20, Zoning, Chpt. 20.08, General Design and Use Regulations, Section 20.08.080, Adult Businesses)

Utah

South Salt Lake City (Title 5, Business Taxes, Licenses and Regulations, Chpt. 5.56, Sexually Oriented Businesses, Section 5.56.060, Zoning).

Wisconsin

Franklin (Unified Development Ordinance, May 1995)

Hudson (Part II, General Legislation, Chpt. 200, Sexually Oriented Businesses, Section 200-2, Findings)

West Allis (Chapter IX, Business and Occupations, 9.28, Adult Oriented Establishments)

Towns, Townships and Counties (by State)

Arizona

Cave Creek (Section 154.058, Adult Uses)

California

Bakersfield (Title 17, Zoning, Chpt. 17.69, Adult Entertainment Businesses, Section 17.69.040, Separation and Distance Requirements)

Bellflower (Chpt. 19, Zoning Regs, Section 19-10, C-G, General Commercial Districts)

Brentwood (Title 17, Zoning, Chpt. 17.690, Adult Entertainment, Section 17.690.004 Regs.)

Carlsbad (Title 21, Zoning, Chpt. 21.43, Adult Entertainment, Section 21.43.060, Minimum Spacing Requirement)

Carpinteria (Title 14, Zoning, Chpt. 14.20 CPD Commercial Planned Development District, Section 14.20.070, Non-concentration of Certain Uses)

Colorado

Basalt (Chpt. 16, Zoning, Art. IX, Supplementary Regs., Section 16-188, Adult Entertainment Uses and Establishments)

Commercial City (Chpt. 21, Zoning, Art. II, Supplementary Regs., Section 21-39, Adult Entertainment Uses)

Connecticut

Farmington (Part II, General Legislation, Chpt. 73, Adult-oriented Establishments, Section 73-2, Definitions)

Wethersfield (Part I, Administrative Legislation, Chapter 46, Adult-oriented Establishments, Section 46-3, Operating Requirements)

West Hartford (Part II, General Legislation, Chapter 177, Zoning. Article IX, Adult-oriented Businesses, Section 177-70, Operating Requirements)

Delaware

New Castle County (Part II, Chpt. 40, Unified Development Code, Art. III, Use Regulations, Section 40.03.313, Adult Uses)

Dover (Code of Ordinances, Appendix B, City of Dover, Delaware Zoning Ordinance, Art. V, Supplementary Regulations, Section 13, Adult Entertainment Establishment)

Kent County (Part II, General Legislation, Chpt. 205, Zoning, Art. XXI, Conditional Uses, Section 205-252, Adult Entertainment Establishments)

Wilmington (Part II, Chpt. 48, Zoning, Art. II, Administration and Enforcement, Division 1, Generally, Section 48-38(3), Nonconforming Uses and Buildings)

Florida

Brevard County (Adult entertainment Code sec. 62-4901, Location restrictions 62-4916)

Broward County (Adult Entertainment Code 20-361)

Miami-Dade County (Chap. 33 Zoning Art. XXVII Liberal Business District)

Georgia

Conyers City (Title 9, Licensing and Regulations, Chpt. 10, Adult Entertainment Establishments, Section 9-10-7, Distance Requirements for Location)

Roswell (Article 4.1, Adult Businesses, General, Section 4.1.7, Location)

Hawaii

Maui County (Title 19, Zoning, Chpt. 19.85, Adult Entertainment Activity, Section 19.85.030, Adult Entertainment)

Idaho

Idaho Falls (Section 4-16-5, Location of Sexually Oriented Businesses)

Illinois

Coal City (Section 156.054, Adult Uses)

Danville (Section 127.03, Limitation on Adult Uses)

Riverdale (Section 17.13.3, Location)

Indiana

Aurora (Section 152.172, Location of Sexually Oriented Businesses)

La Porte (Municipal Code Division 5. Adult Entertainment Business Section 82-116 & 82-117)

Muncie (Zoning Code Section 150.28, Adult Entertainment Business)

Vincennes (Section 118.11, Location Restrictions)

Iowa

Decorah (Title 17, Zoning, Chpt. 17.108 M-I, Industrial Park District, Section 17.108.080, Special Requirements)

Kentucky

Hopkinsville (Section 119.07, Location)

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Montgomery County (Section 59-A-6.16, Adult Entertainment Business)

Massachusetts

Franklin (Part II, General Legislation, Chpt. 185, Zoning, Art. V, Special Regs., Section 185-47, Adult Entertainment Establishments)

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Albert Lea (Ch. 74, Zoning, sec. 74-27, Sexually Oriented Businesses)

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Owatonna (Ch. 10, Nuisances Defined and Regulated, sec. 1095:00, Adult Establishments)

Missouri

Perryville (Title 5, Business Licenses and Regs., Chpt. 5.08, Adult Entertainment Establishments, Section 5.08.040, Location and Spatial Separation Requirements)

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Mount Olive (Part IV, Land Use Procedures, Chpt. 400, Land Use, Art. VI, Zoning, Section 4400-79, Adult Entertainment)

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Coatesville (Part II, General Legislation, Chpt. 224, Zoning, Art. XII, Supplemental Use Requirements, Section 224-60, Principal Use Structures)

Dover (Part II, General Legislation, Chpt. 236, Land Use and Development, Art. IV, Zoning, Section 236-40, Conditional Use Permits)

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Aug 15, 2001

No. 00-799

IN THE

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

ALAMEDA BOOKS, INC.
and HIGHLAND BOOKS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, FEMINISTS FOR FREE EXPRESSION, FREEDOM TO READ FOUNDATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, PUBLISHERS MARKETING ASSOCIATION, and VIDEO SOFTWARE DEALERS ASSOCIATION
AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS

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FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT

American Booksellers Foundation for Free Expression, Feminists For Free Expression, Freedom to Read Foundation, International Periodical Distributors Association, Publishers Marketing Association and the Video Software Dealers Association submit this joint amicus brief in support of respondents, urging that this Court affirm the decision of the court below.[1] This brief is submitted upon written consents of counsel to petitioner and respondents, which are submitted herewith.

STATEMENT PURSUANT TO RULE 37.6

Pursuant to Rule 37.6 of the rules of the Court, counsel for the *amici curiae* discloses that he authored the brief in whole. No person or entity, other than Media Coalition, Inc., a trade association of which *amici curiae* are members or with which they are affiliated, and of which the parties in this action are not members, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF *AMICI*

Amici's members (hereinafter "*amici*") own and operate retail establishments which rent and sell books, magazines, videos, sound recordings, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific and entertaining, or publish, distribute and are consumers of materials sold in such retail establishments. Libraries and librarians represented by the Freedom to Read Foundation provide such materials to readers and viewers, and members of Feminists for Free Expression are involved in the creation of such materials.

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[1] A description of the *amici* is attached as Appendix B.

Zoning and business regulatory ordinances applying limitations and restrictions based on the sexually explicit nature of First Amendment-protected material sold or displayed by retail establishments are proliferating, justified by the alleged negative impact of such establishments on their communities. As described more fully below, over the years the definitions of "adult use," "adult business," and "adult bookstore" in such ordinances have expanded in scope so that today they often do not comport with the common understanding of those terms. In many cases, as, for example, when defining adult businesses to include retailers deriving merely 10% of their income from material having sexual content, these ordinances apply even to retailers whose predominant product lines have no sexual content, explicit or otherwise.

Amici are mainstream providers of speech in a variety of fora and media. They are concerned that permitting municipalities to pass regulations of "adult" retailers supported only by general assumptions or vague perceptions, by reference to another municipality's assumptions or perceptions, or by reference to the decision of another court with respect to a different community and, often, a substantively different statute, will, as a practical matter, eviscerate the constitutionally-mandated requirement that the municipality have a reasonable basis for believing that the regulated business has negative secondary effects on the community. Applying "adult use" regulations to mainstream bookstores and video stores by stretching definitions beyond their normally understood meaning restricts protected speech in a manner antithetical to the First Amendment, stigmatizes retailers who deal in these protected materials, and chills such retailers from stocking and selling First Amendment-protected mainstream materials which describe or portray sexual matters, either in a fictional or non-fictional context.

In the past, many of the *amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws infringing on First Amendment rights. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), *aff'g* 4 F. Supp. 2d 1029 (D.N.M. 1998); *PSInet Inc. v Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000); *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *American Booksellers Ass'n, Inc. v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993); *Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738 (Tenn. 1979). They have also filed *amicus* briefs in the Court to advise it as to the impact of its decisions with respect to regulation of sexually frank speech on mainstream creators, producers, distributors and retailers. *See, e.g., City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000); *Denver Area Educ. Tel. Consortium v. FCC*, 518 U.S. 727 (1996); *United States v. X-Citement Video*, 513 U.S. 64 (1994).

SUMMARY OF ARGUMENT

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), and its progeny dealt with regulation of "adult businesses" as that term is commonly understood, namely businesses that exclude minors and whose inventory is predominantly sexually explicit in nature. The rationale of the Court in permitting such regulation of businesses engaged in the sale, rental or offering of First Amendment protected speech was that such regulation "represents a valid governmental response to the 'admittedly serious problems' created by adult theatres," and therefore was not content-based. 475 U.S. at 54. With the passage of time, however, municipalities have expanded and loosened the definition of

adult businesses so that even mainstream businesses with only a minor portion of their business, inventory or display space devoted to material with sexual content fall within the scope of adult business regulation.

This creeping expansion has resulted in regulation of First Amendment-protected businesses as to which there are no readily apparent negative secondary effects as required by *Renton*, suggesting that the real purpose of such ordinances is not zoning directed at the avoidance of negative secondary effects, but rather is to make it more difficult to distribute, or even to suppress the sale of, these protected works in a given municipality. The First Amendment therefore requires strict adherence to the *Renton/O'Brien* requirement that a municipality rely on evidence that all businesses falling within the definitional scope of the adult business ordinance are likely to cause negative secondary effects in the community. Thus, the more demanding approach of the court below requiring such evidence was correct, and the judgment should be affirmed.

ARGUMENT

THE EXPANSION OF THE DEFINITION OF "ADULT BOOKSTORES" AND "ADULT BUSINESSES" TO INCLUDE MAINSTREAM RETAILERS HIGHLIGHTS THE IMPORTANCE OF THE REQUIREMENT THAT MUNICIPALITIES JUSTIFY RESTRICTIVE ZONING OF SELLERS OF FIRST AMENDMENT-PROTECTED MATERIALS BY EVIDENCE OF THE ALLEGED HARM

The seminal case in the Court's jurisprudence regarding "adult businesses" is *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), which permitted the

imposition of restrictive zoning requirements on theaters exhibiting feature-length adult films. In *Renton*, the Court described the holding of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), upon which it relied, "that, at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to the 'content-neutral' time, place and manner regulations." 475 U.S. at 49. Applying the standards set forth in *United States v. O'Brien*[2], the Court found that the Renton regulation furthered an important or substantial governmental interest, even though Renton had enacted the ordinance "without the benefit of studies specifically relating to 'the particular problems or needs of Renton'." 475 U.S. at 50. The ordinance was upheld on the basis that the City of Renton had relied on the experience of, and studies by, the City of Seattle, only a few miles away. In permitting Renton to so rely, the Court pointedly warned that the studies or experience of others could be relied on *only* "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." 475 U.S. at 51-52. Thus the Court required some evidentiary basis demonstrating the likelihood of unwanted secondary effects with respect to the specific businesses regulated.[3]

The Court's warning was prescient and is particularly important in light of the creeping expansion over the last 15

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2 391 U.S. 367 (1968).

3 Even in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), a case involving nude dancing rather than more traditional speech forms such as books, periodicals, or motion pictures, the majority required reliance on "actual experience." 529 U.S. at 300.

years of what municipalities include within the rubric of "adult use." *Renton* and the other early cases involved the zoning of what is generally known, and often self-labeled, as an "adult motion picture theater," "adult bookstore" or "adult arcade." (For example, Playtime Theatres avowedly intended to show only sexually explicit adult films.)

These earlier zoning restrictions reflected a perception that such "adult" motion picture theaters, "adult" bookstores and other "adult" business brought increased crime, decreased property values and other indicators of neighborhood deterioration as a result of suggestive advertising, undesirable clientele, and a general belief that "adult uses" were antithetical to a vibrant and strong neighborhood. Merely having signage proclaiming the "adult only" nature of a retail establishment was perceived to commence and then accelerate the breakdown of a neighborhood. While recently the validity of the studies supporting these assumptions and perceptions has been questioned,[4] courts have generally accepted the studies.

The studies and the apparent understanding of the courts has equated the "adult businesses" to which zoning restrictions applied with the common understanding of what is an adult business, i.e., a business excluding minors whose inventory is predominantly sexually explicit in nature and marketed as such. Regarding such businesses, it may be that municipalities can reasonably rely on relevant common experience to conclude that such businesses cause negative secondary effects.

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4 *See, e.g.*, Paul, Linz and Shafer, *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 Comm. L. & Policy 319 (2001).

More recently, however, municipalities have expanded the definition of the entities covered by "adult use" zoning ordinances so that they include mainstream retailers whose inventory and marketing approach is mainstream, not highlighting the sexual content of some of their book, film or periodical inventory. Municipal ordinances now in effect are not limited to retailers predominantly offering sexually explicit materials. As little as 10% of floor space (Edina, Minn., City Code, §850.03 (subd. 3)) or of stock (Lewisville, Tex., Municipal Code, §17-31(B)), 15% of display, shelf, rack, table or floor area (Fitchburg, Mass., City Code, §181-18.2(A)(1); Minneapolis, Minn., Code of Ordinances, §549.340), 15% of gross revenues or inventory (Rockwall, Tex., City Code, §27-1(2)), 150 square feet of floor space for display (St. Paul, Minn., Legislative Code, §60.200) devoted to material emphasizing the description or depiction of sexual matter qualifies a retailer as an "adult bookstore" or "adult business."[5] These ordinances all regulate far more than what the public considers "adult businesses." In St. Paul, Minnesota, for example, a general bookstore with a section on relationships and sexual manuals exceeding ten feet by fifteen feet is defined and would be regulated as an "adult bookstore." Similarly, in Lewisville, Texas, a mainstream

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[5] *See* excerpts in Appendix A hereto. Proposed statutes have gone even further. An Illinois bill would classify as an adult bookstore "any establishment with a section or segment devoted" to sexually explicit books, magazines, periodicals or films. As the bill covers such a "section or segment" irrespective of size, any retailer which chooses to segregate sexual-related materials to exclude younger children or even to establish a "sexual relationships" section as part of a topical shelving scheme would be categorized and regulated as an "adult bookstore." Ill. S.B. 609 (2001-02 General Assembly).

retailer carrying one Playboy for every nine Newsweeks would be deemed an adult business.

While, as Shakespeare noted, "a rose by any other name would smell as sweet" because it would still be a rose, calling a rose poison ivy does not make it so. Similarly, statutorily defining a mainstream retailer as an adult business does not make it one, and labeling it such does not mean it would have negative secondary effects on its neighborhood.

Certainly there is no basis for labelling retailers that stock only one sexually related item as adult businesses responsible for the deterioration of their neighborhoods. On the other hand, the traditional adult business — promoted as such, limited to adults, and primarily stocking sexually explicit material — can be presumed to cause negative secondary effects, if the conclusions drawn from the studies discussed in *Renton* and the subsequent cases are accepted. However, many businesses fall in the spectrum between these two extremes. If a municipality desires to regulate as adult businesses retailers falling between the extremes, the evidentiary requirement of *Renton*, which requires a municipality to have some evidence of a reasonable likelihood of negative secondary effects, must be maintained. Otherwise, the regulation becomes, in actuality, a conduct-based regulation, and thus unconstitutional. In order to comply with the *O'Brien/Renton* requirement, the alleged negative secondary effects must justify the full scope of the businesses regulated.

The lower the threshold created by the ordinance, the more intense is the economic pressure on mainstream businesses to cease selling any sexually frank material which might trigger the zoning restriction. A traditional "adult business," with admission restricted to adults, has an inventory which is virtually exclusively of interest to those who would enter such an establishment seeking sexually

explicit material. Thus, in a municipality in which a *Renton*-type zoning ordinance is in effect, the choice for such a business is to geographically comply or to go out of business. Since such a business relies on a consumer base seeking its products, presumably many customers will seek them out wherever they locate.

The situation is different in the case of a mainstream book or video retailer, which carries a wide range of material, most of which has little or no sexual content. It is not an "adult bookstore" in the usual meaning of the term, and does not advertise or promote itself as such. But with thresholds in ordinances as low as 10% of total display area, stock or gross income devoted to material "emphasizing" sexual matters, or, as in Mesa, Arizona, having a significant portion of its gross income in *any one month* derive from the sale or rental of sexually explicit material (City Code § 6-16(D)), a proprietor of a general bookstore or video store must be concerned. The likelihood is that the proprietor will self-censor First Amendment-protected materials to stay well clear of the zoning requirement since location is significant to economic viability.

Nor are these ordinances limited to restricting the location of the retailer (though that, alone, constitutes a significant business restriction). Mesa, Arizona, for example, requires that the proprietor or anyone having a 10% interest in the business be licensed (City Code, §§ 6-16-3,4), requires that employees be licensed as "sexually oriented business employees" (City Code, §6-16-3(A)(2)), limits the hours of the retailer (City Code, §6-16-14), and imposes licensing fees of $500 per establishment and $50 per employee (City Code, §6-16-5). These requirements impose additional business costs on mainstream retailers incidentally carrying sexually-related constitutionally-protected materials, and also stigmatizes them and their employees.

Absent specific evidence to the contrary, a legislative body cannot reasonably assume that a mainstream retailer such as *amici's* members, with a modest selection of sexually frank materials, increases crime and decreases property values in the neighborhood. Reliance on such assumptions demonstrates that such ordinances are not in fact content-neutral, but rather are intended to suppress the availability of one class of First Amendment-protected materials in the guise of zoning regulations to "protect our neighborhoods."

In its prior jurisprudence on this issue, the Court ruled in cases in which the ordinance in question was not so broadly defined as to regulate mainstream businesses simply by calling them "adult." Similarly, *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), relied upon by petitioner, involved a statute defining adult bookstores as establishments having a "preponderance" of material emphasizing sexual activities. In the case at bar, when passing the amendment at issue, the City Council apparently had no evidence as to the impact of such a regulation. Instead, they relied on *Hart Book Stores*, a pre-*Renton* decision. In *Hart*, the only evidence mentioned to justify the conclusion that an adult video store and an adult bookstore at the same location would have a greater deleterious impact than either alone was a County Health Department report with respect to unhealthy conditions, separate and apart from whether one or two businesses were carried out at the site. 612 F.2d at 829 fn. 9.

It is thus particularly important to affirm the decision of the court below so that municipalities will understand that they are required to rely on evidence reasonably related to the nature and scope of the ordinances they pass.

CONCLUSION

Amici urge this Court to affirm the decision of the court below to emphasize that municipalities are required reasonably to rely on evidence as to the likelihood of negative secondary effects stemming from the nature of retailers covered by the ordinance they desire to enact.

Dated: July 19, 2001

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APPENDIX A: EXCERPTS FROM SAMPLE ORDINANCES

1. EDINA, MN, CITY CODE, SECTION 850.03 (SUBD. 3):

The following words, terms and phrases, as used herein, have the following meanings:

* * *

Adult Bookstore. An establishment or business which barters, rents or sells items consisting of printed matter, pictures, slides, records, audio tape, videotape, or motion picture film and either alone or when combined with Adult Motion Picture Rental or Sales and Adult Novelty Sales within the same business premises has either 10 percent or more of its floor area containing items which are distinguished or characterized by an emphasis on the depiction or description of Specified Sexual Activities or Specified Anatomical Areas.

2. FITCHBURG, MA, CITY CODE, SECTION 181-18.2(A)(1):

* * *

(1) ADULT BOOKSTORE or ADULT VIDEO STORE - A business that devotes more than 15% of the total display, shelf, rack, table, stand or floor area, utilized for the display and sale of the following:

(a) Books, magazines, periodicals, or other printed matter, or photographs, films, motion

pictures, video cassettes, slides, tapes, records, CD-ROMs or other forms of visual or audio representations which meet the definition of "harmful to minors" and/or "sexual conduct" as set forth in M.G.L. C. 272 S.31, . . .

3. LEWISVILLE, TX, MUNICIPAL CODE, SECTION 17-31(B):

* * *

Sexually-Oriented Businesses: Include, but are not limited to, any of the following businesses:

(1) **Adult Bookstore:** An establishment having as a substantial or significant portion (10% or more) of its stock and trade, books, magazines and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities", or "specified anatomical areas", or an establishment with a segment or section devoted to the sale or display of such material, or instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities".

4. MESA, AZ, CITY CODE, TITLE 6, CHAP. 16, SECTION 6-16-1:

* * *

ADULT BOOKSTORE, ADULT NOVELTY STORE, OR ADULT VIDEO STORE: A commercial establishment which offers sexually explicit material for sale or rental, for any form of consideration, and meets any of one (1) or more of the following criteria:

(A) That has thirty percent (30%) or more of its inventory, stock, or merchandise on hand at any time that is comprised of sexually explicit material; or

(B) That has a substantial or significant portion of its inventory, stock, or merchandise on hand at any time that is comprised of sexually explicit material; or

(C) That derives thirty percent (30%) or more of its gross income for any one (1) calendar month from the sale or rental, for any form of consideration, of sexually explicit material; or

(D) That derives a substantial or significant portion of its gross income for any one (1) calendar month from the sale or rental, for any form of consideration, of sexually explicit material; or

(E) That at any time displays sexually explicit material either in a display area that is thirty percent (30%) or more of its total display area equal to

at least two hundred (200) square feet. For purposes of calculating the floor area, the business premises shall be viewed from above in two (2) dimensions and all areas that are reserved for foot traffic shall be included; or

(F) That displays a substantial or significant amount of sexually explicit material in its display area.

5. MINNEAPOLIS, MN, CODE OF ORDINANCES, SECTION 549.340:

* * *

Adults-only bookstore or video store. An establishment having as a substantial or significant portion of its stock in trade for sale, rental or display, books, magazines, periodicals, films, videos, digital video disks, slides, or other media, which are distinguished or characterized by their principal emphasis on matters depicting, describing or relating to nudity, sexual conduct, sexual excitement or sadomasochism, as defined below, or an establishment with a segment or section devoted to the sale, rental or display of such material which comprises fifteen (15) percent or more of the total sale, rental or display area of such establishment, or five hundred (500) square feet, whichever is less. An adults-only bookstore or video store also shall include an establishment that offers films, videos, digital video disks, slides or similar media for viewing on premises.

6. ROCKWALL, TX, CITY CODE, SECTION 27-1(2):

* * *

(2) *Adult bookstore* or *adult video store* means a commercial establishment which as a principal business purpose openly advertises or displays or offers for sale or rental for any form of consideration any one or more of the following:

(a) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slices, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas:; or

(b) Instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."

As used herein, "principal business purpose" shall include any business activity which accounts for fifteen (15) per cent or more of the following: (I) gross revenues of the business; (ii) floor area of the business; or (iii) inventory.

7. ST. PAUL, MN, LEGISLATIVE CODE, SECTION 60.200:

* * *

Adult bookstore. Adult bookstore means a building or part of a building used for the barter, rental or sale of a significant portion of items consisting of (1) instruments, devices or paraphernalia which are designed for use in connection with "specified sexual activities," or (2) printed matter, pictures, slides, records, audio tape, videotape, motion picture film, or CD Roms or another form of recording if such items are distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas." Significant portion of items" shall mean more than fifteen (15) percent of usable floor area or more than one hundred fifty (150) square feet of floor area used for the display and barter, rental or sales of such items. No obscene work shall be allowed.

APPENDIX B: THE *AMICI*

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

Feminists For Free Expression (FFE) is a national, not-for-profit organization of diverse feminist women and men, many of whom produce expressive materials, who share a commitment both to gender equality and to preserving the individual's right and responsibility to read, view, and produce such materials free from government intervention. Since 1992 it has worked actively to oppose the misconception that censorship may sometimes be in the interest of women and others who feel unequally treated by society, believing that the goal of equality is inextricably linked with the values enshrined in our Constitution's free speech clause.

The Freedom To Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The International Periodical Distributors Association is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and

periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Publishers Marketing Association (PMA) is a nonprofit trade association representing more than 2,000 publishers across the United States and Canada. PMA represents predominantly nonfiction publishers and assists members in their marketing efforts to the trade.

The Video Software Dealers Association (VSDA) is the trade association for the home video industry. It represents more than 2,000 member companies in North America and 22 countries worldwide, including retailers of motion picture videos and video games, the home video divisions of major and independent motion picture studios, video game and multimedia producers, and other associated businesses that comprise the home video entertainment industry. VSDA retailer members sell and rent both non–sexual and sexually oriented material and thus may be subject to "adult business" ordinances.

AUG 16 2001

Supreme Court, U.S.
FILED
AUG 16 2001
CLERK

No. 00-799

In The
Supreme Court of the United States

THE CITY OF LOS ANGELES,
Petitioner,

v.

ALAMEDA BOOKS, INC., and
HIGHLAND BOOKS, INC.,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

BRIEF AND APPENDIX OF THE FIRST AMENDMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

---

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae First Amendment Lawyers Association ("FALA")[1] is an Illinois not-for-profit corporation with some one hundred ninety-five members throughout the United States and Canada. Its membership consists of attorneys who regularly practice in the defense of First Amendment rights against governmental intrusion, and who regularly litigate various facets of the issues now before the Court. No less than three of its members are arguing cases before the Court this term. *Amicus* believes that reversing the decision of the Ninth Circuit in this action will result in significant erosion of First Amendment freedoms, will have the consequent effect of rendering as illusory judicial review of regulations impacting upon any form of sexually regulated expression, and will permit government to regulate the content of speech and expression predicated upon the pretextual incantation, and possibly non-existing concern, of the "secondary effects" of adult entertainment.

SUMMARY OF ARGUMENT

This Court should not relieve government of its evidentiary burdens under intermediate constitutional scrutiny by declaring, as a matter of law, that "secondary effects" are necessarily engendered by all forms of sexually related expression in all circumstances, and that any form of regulatory "experimentation" is therefore

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[1] Counsel for neither party authored the present *amicus* brief in whole or in part. Pursuant to Supreme Court Rule 37.6, no person or entity, other than the *Amicus Curiae*, its members, or its counsels, made any monetary contribution to the preparation or submission of the brief. Both parties have consented to the filing of this brief, and those consents are being filed separately with this Court.

permissible. This Court should zealously preserve both the government's obligation to establish a specified basis for enacting regulations that impact upon speech and expression related activities, and a litigant's right to contest the government's assertion of the existence of secondary effects motivation for enacting such laws.

Recent judicial decisions as well as analysis of both "older" and more recently conducted secondary effects studies bely any assertion that secondary effects can merely be presumed to derive from the operation of an "adult" entertainment establishment. In addition, a review of the 1977 Los Angeles secondary effects study reveals no basis for enactment of the zoning amendments at issue here. Finally, this Court should provide guidance for lower courts to use when considering the evidentiary implications of secondary effects information.

Amicus Curiae urges this Court to adopt the position taken by the Ninth Circuit below, and affirm its decision.

ARGUMENT

I. REVERSAL OF THE DECISION BELOW WILL MEAN NOTHING LESS THAN REJECTION OF THE INTERMEDIATE SCRUTINY STANDARD OF *UNITED STATES V. O'BRIEN*, 391 U.S. 367 (1968) AS A FORMULA FOR CONSIDERING THE CONSTITUTIONALITY OF REGULATIONS IMPACTING UPON SEXUALLY RELATED EXPRESSION, AND ADOPTION RATHER OF A RATIONAL BASIS LEVEL OF ANALYSIS; A CONCERN SPECIFICALLY EXPRESSED TO THIS COURT BY APPELLEES IN *RENTON V. PLAYTIME THEATRES*, INC., 475 U.S. 41 (1986).

In the litigation that ultimately resulted in this Court's decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the appellees[2] argued that the "adult" zoning ordinance at issue there, which regulated based upon the content of exhibited entertainment, was subject to strict scrutiny analysis. Brief of Appellees, No. 84-1360, at 19-21 ("The test of these restrictions *must* be 'strict scrutiny'") (emphasis in original). A majority of this Court determined, however, that zoning regulations of adult businesses which were enacted upon a concern of the "secondary effects" of such facilities needed only to pass constitutional muster under intermediate scrutiny (475 U.S. at 47-49), thereby invoking the standards of *United States v. O'Brien*, 391 U.S. 367 (1968).

The second and fourth prongs of that test are particularly relevant to the issues here, and evaluate, respectively: Whether the governmental regulation "*furthers* an important or substantial governmental interest," and whether the "incidental restriction on alleged First Amendment freedoms is no greater than is *essential* to the furtherance of that interest." *Id.* at 377 (emphasis added).

In response to the ruling of this Court in *Renton*, the appellees filed a Petition for Rehearing asserting:

> By allowing cities to use any evidence so long as it 'is reasonably believed to be relevant to the problem that the city addresses,' . . . the Court has abandoned the determination of whether or not a compelling governmental interest exists to

[2]Two businesses which desired to operate "adult" movie theaters in the City of Renton, Washington -- a municipality which had up to that point no existing "adult" uses.

political functionaries. No longer will regulatory bodies be required to offer empirical evidence to support their regulation of speech-related activities. Instead, they will be allowed to rely on *mere assertions*. Any decision they make is *effectively immunized from judicial scrutiny* since a municipality can readily find other municipal ordinances to rely upon, thus always retrospectively justifying special zoning regulations for whatever speech related activity it finds distasteful or unwanted . . . .

* * *

> By abandoning the requirement for empirical evidence and adopting the totally subjective test of 'reasonably related to its purpose,' the Court has given cities a blank check to suppress or limit speech under the guise of zoning. This Court's direction to the lower courts is to blindly accept any contention of a secondary effect as a substantial governmental interest. *Furthermore, any means-end scrutiny test has been abandoned in favor of 'experimentation.'*

Petition for Rehearing, No. 84-1360, at 4-5, 7 (emphasis added, citations omitted).

These concerns were in reference to the conclusions reached by this Court that the First Amendment did not require a municipality, before enacting an ordinance, to "conduct new studies or

produce evidence independent of that already generated by other cities, so long as whatever evidence the city *relies upon is reasonably believed to be relevant* to the problem that the city addresses," and that cities "must be allowed a reasonable opportunity to *experiment* with solutions to" address the concerns of secondary effects. *Renton*, 475 U.S. at 51-52 (emphasis added), *partially quoting*, *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976)(plurality).

In essence, Playtime Theatres asserted that while giving lip service to the *O'Brien* standard, this Court was in all reality opening the door to constitutional adjudication of regulations directed at sexually related expression not under intermediate scrutiny, but utilizing mere rational basis analysis. The Court obviously rejected that contention as it denied the Petition for Rehearing. 475 U.S. 1132 (1986).

This case, however, represents the culmination of the concerns noted by Playtime Theatres. The City of Los Angeles and its *amici* ask this Court to reverse the Ninth Circuit and conclude that in litigation concerning the constitutionality of regulations of *any form* of sexually related expression, the government need *not* be put to *any* burden of establishing the fulfillment of the second or fourth prongs of the *O'Brien* test, other than having merely uttered the words "secondary effects." In reality, what they argue for this Court to adopt here is virtually rational basis scrutiny, or no scrutiny at all.[3] And, they desire to

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[3]*See, e.g.*, Brief of *Amici Curiae* American Planning Assoc. and Community Defense Counsel Brief, at 23 ("Contrary to the Ninth Circuit's opinion, this Court has never held that every application of the ordinance has to effectively eliminate secondary effects"); Capital Resource Institute & Campaign for California Families as *Amici Curiae* at 6 (". . . where a State's determination as to secondary effects relies on 'various unproveable assumptions' there is no offense to the Constitution").

have this Court render as mere *dicta* the "reliance" component for supporting evidence as set forth in *Renton*, as they believe that a proponent of speech and expression should be completely foreclosed from litigating the question of whether a municipality "reasonably believed" information alleged to justify enactment of a regulation was indeed relevant to the concerns at hand.

The best recitation of the distinction which lower courts perceive between the intermediate level of scrutiny that is still theoretically applicable to evaluating the constitutionality of regulations that impact upon sexually related expression and that of mere rational basis scrutiny is found in *J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998):

> . . . *Renton* teaches us that the government must produce *some* evidence of adverse secondary effects produced by public nudity, as applied to nude dancing, or adult entertainment in order to justify a challenged enactment using the secondary effects doctrine . . . . '[U]nlike our review under a standard of rationality, we will not hypothesize such an objective or accept a naked assertion. Rather, we intrude into the regulatory decision process to the extent that we insist upon objective evidence of purpose' a study or findings. Insisting upon findings reduces the risk that a purported effort to regulate effect is a mask for regulation of content' . . . . 'To insist on less is to reduce the First Amendment to a *charade*.'

Id. at 371-73 (first emphasis in original and second added), *quoting, SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988); and *Phillips v. Borough of Keyport*, 107 F.3d 164, 178 (3rd Cir. 1997) (*en banc*).

Amicus FALA believes that if this Court reverses the Ninth Circuit, it will have then indeed reduced the First Amendment to a mere "*charade*," and reference to a number of recent lower court decisions illustrates that "interpretation" of the secondary effects doctrine has indeed taken the judiciary well down such a precarious path.

In *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998), the Sixth Circuit considered the constitutionality of a state statute which limited the hours-of-operation of certain defined adult entertainment establishments. The court began its analysis by agreeing with the plaintiff there that the legislation at issue was "obviously not content-neutral" (referring to the third *O'Brien* factor) in that the law singled out "certain establishments for regulation based only on the type of literature they distribute" (*id.* at 438-9), but nevertheless asserted that:

> . . . [A] kind of *legal fiction* has been created that calls regulation of such literature 'content-neutral' when what is meant is only that the regulation is constitutionally valid.

Id. at 440 (emphasis added). This "legal fiction" led the court to conclude that an *O'Brien* analysis was unnecessary, and that the "real question" was rather "one of reasonableness." *Id.*

Another federal appellate court has interpreted the secondary effects doctrine to require rejection of the truth by the judiciary.[4] In a case where the Seventh Circuit also evaluated the constitutionality of an hours-of-operation restriction, the plaintiff there had presented proofs demonstrating that not only was there no relationship between an adult-oriented business' hours of operation and crime *in general*, but that there was no such correlation between the plaintiff's establishment and crime *in specific*. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999).

In concluding that the "district court properly *rejected* this evidence," the appellate court noted:

> DiMa's contradictory evidence would be highly prohibitive if our task were to discover the *objective truth* about the effect of Pure Pleasure's operating in Hallie. But our task under the First Amendment is *far different*.[5]

185 F.3d at 831 (emphasis added).

While predating this Court's decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), the presentation by

[4]Cf., F.R.E. Rule 102 ("These rules shall be construed to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined") (emphasis added).

[5]*See also, International Eateries of America v. Broward County*, 941 F.2d 1157, 1163 (11th Cir. 1991) (the appellate court there noting that the plaintiff had argued that "there is *uncontradicted evidence* in the record that Thee Dollhouse III has not in fact caused any adverse effects on surrounding property values and that property values have actually *increased at a higher rate* than before the opening of Thee Dollhouse III. *This argument holds no weight*") (emphasis added).

DiMa of such contradictory evidence is *exactly* what the plurality opinion authored by Justice O'Connor appears to permit.[6] Nevertheless, this Court ultimately denied certiorari in *DiMa*. 529 U.S. 1067 (2000).

Perhaps the most questionable extension of the secondary effects doctrine was reached recently in *Voyeur Dorm, L.C. v. City of Tampa*, 121 F.Supp.2d 1373 (M.D. Fla. 2000). There, the City of Tampa applied an adult zoning ordinance (prohibiting an "adult" establishment in a residential zoning district) against a dormitory of five women that had internet cameras located throughout, with the images then, for a fee, being broadcast to customers across the world wide web. *Id.* at 1375-76. It was established that no member of the public was ever offered "any adult entertainment *on* the premises," and that the viewing took place in "virtual space. . . ." *Id.* at 1377 (emphasis in original). In upholding the application of the zoning ordinance to the dorm, the district court permitted reliance upon other secondary effects studies, and found no distinction whatsoever in the fact that at issue was a mere residence that never attracted even a single patron to its premises. *Id.* at 1379-1381.

In addition, the secondary effects doctrine and a seeming lack of clarity in regard to its limitations and parameters, has emboldened governmental entities to enact an ever-widening array of regulations directed at sexually related expression, no matter how absurd. For example, Illinois (and various of its municipalities)

[6]*See*, 529 U.S. at 298 ("Here, Kandyland has had ample opportunity to contest the council's findings about secondary effects -- before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. . . . In the absence of any reason to doubt it, the city's expert judgment should be credited") (plurality).

adopted zoning regulations requiring adult businesses to be locationally dispersed from uninhabited forest preserves. *See, e.g, Palmetto Properties, Inc. v. County of Dupage*, ___ F.Supp.2d ___, 2001 WL 315180 (N.D. Ill. March 29, 2001).

In the same vein, the City of Bangor, Maine, enacted what the District Court described as a "unique" regulation "not modeled on any existing ordinances," which precluded the issuance of a certificate of occupancy to any individual desiring to run a business offering nude dancing if the applicant also operated any of a number of other businesses, including a booking agency. *Diva's, Inc. v. City of Bangor*, 21 F.Supp.2d 60, 62-65 (D. Maine 1998).

Other municipalities have, in the name of secondary effects, enacted licensing ordinances for adult business owners, employees, and entertainers requiring as a predicate to license issuance such things as *disclosure of the applicant's mental history for the past ten years*, multiple affidavits of "good moral character," and verification as to certain medical conditions. App. 43-52. These ordinances have even gone so far as to preclude an applicant from obtaining a license to own, work at, or entertain in an adult entertainment facility if the individual possesses a similar license *anywhere in the United States, Canada, or South America!* App. 49, 52. Mexico or Belize would, however, be fine.

These few examples are not mere aberrations, and the members of *Amicus* are regularly required to litigate the constitutionality of identical, similar, and even more nonsensical regulatory provisions. It is these types

of overbearing regulations that Petitioner and its *amici* seek to immunize from judicial scrutiny.

They desire this Court to endorse a construct of the secondary effects doctrine, exemplified by *Richland Bookmart*, *DiMa*, and *Voyeur Dorm*, where any analysis under *O'Brien* is either dead or meaningless, where virtual rational basis scrutiny prevails, and where the truth is not only irrelevant, but if found to be inapposite to the conclusion that a municipality desires to reach, is simply to be "rejected."

These decisions, and others like them, may stem from the fractured nature of the Court's most recent pronouncements in this area as exemplified by the two plurality opinions in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) and *Pap's*, or they may represent unintended (by this Court) aberrant misinterpretations of the secondary effects doctrine. Regardless, they pose a real and serious threat of erosion to First Amendment protections.

Accordingly, in response to this seemingly never-ending watering down of the protections afforded by the secondary effects doctrine (i.e., *real* intermediate scrutiny), the FALA here discusses decisions which have recognized the lack of connection between expressive activities and secondary effects; the supposed findings of the "secondary effects studies" which are relied upon by municipalities across the country in order to justify regulation of sexually-related expression; the results of more recently conducted secondary effects studies performed utilizing sound methodological standards -- including those undertaken by government itself -- which fail to establish *any* connection between the types of adult-oriented businesses of today and perceived negative

secondary effects; and the constitutional ramifications of adopting the dangerous legal standards proposed by the City of Los Angeles and its *amici*.

II. THIS COURT SHOULD NOT ADOPT THE IRREBUTABLE PRESUMPTION THAT SEXUALLY RELATED EXPRESSION NECESSARILY ENGENDERS ADVERSE "SECONDARY EFFECTS."

A. JUDICIAL DECISIONS BELIE THE NOTION THAT "SECONDARY EFFECTS" CAN BE PRESUMED TO EMANATE FROM SEXUALLY RELATED EXPRESSION.

Petitioner's *amici* contend that evidentiary substantiation of adverse secondary effects being associated with certain categories of expression is unnecessary because "we just know" this connection exists, with *amici* Morality in Media, Inc., even going so far as to state that legislation can be predicated upon reference to the "collective common sense." Brief *Amicus Curiae* of Morality in Media, Inc., at 10. What if, however, the "collective common sense" is not supported in either truth or fact, but is rather merely used as a fictional and thus pretextual justification for restricting or banning a form of expression that some may feel to be undesirable?[7]

Certainly, there is no more long-standing assumption by this Court in regard to "adult" entertainment establishments than the belief that the combination of alcohol and forms of nude and/or semi-nude dancing creates a synergistic effect resulting in the increase in crime. *See, e.g., New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981) (in

[7] Indeed, a tool of censors throughout the ages has been to appeal to bigotry and prejudice and call it "common sense."

upholding a regulation that banned topless dancing in establishments that were licensed to sell alcoholic beverages, the Court cited to the New York State Legislative Annual 150 (1977), which stated that "*[c]ommon* sense indicates that any form of *nudity coupled with alcohol in a public place begets undesirable behavior*") (emphasis added). *See also, City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 96 (1986); *California v. La Rue*, 409 U.S. 109, 114, 118 (1972); and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975).

Yet, is this "common sense" such a certainty that courts should merely dismiss any examination of, or challenge to, this supposed connection? A federal appellate court recently and appropriately answered in the negative.

In *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), the County commissioned its police department to conduct a study of the crime statistics concerning twelve drinking establishments; six featuring adult entertainment and six that did not. The study concluded that:

> . . . [T]here was no statistical correlation showing an increase in crime in adult entertainment establishments that served alcoholic beverages. *Rather, the statistics indicated greater instances of calls for service and reported crime at non-adult entertainment establishments that served alcoholic beverages.*

Id. at 979 (emphasis added).

The six adult dance clubs also had conducted an additional study which examined their "economic impact upon their surrounding environs." *Id.* That study did "not identify any detrimental impacts as caused by the Clubs." The County then commissioned an analysis and critique of that study, which validated its findings and concluded that the "Clubs had caused no quantifiable 'blight' upon their environs." *Id.* at 989-990.[8]

Nevertheless, the County enacted an ordinance prohibiting the sale or consumption of alcoholic beverages on the premises of adult entertainment establishments predicated upon the concern of "negative secondary effects," and based this enactment "upon the experience of other urban counties and municipalities. . . ." *Id.* at 980-81.

The Eleventh Circuit began its analysis by noting that it could find "no basis" for the defendants' contention that pursuant to *Barnes* and *Pap's*, the Court could merely "presume the evidence needed to meet the second prong [furthering a governmental interest] of the *O'Brien* test." *Id.* at 985 (clarification added). The court observed, further, that unlike in *Pap's* and its own earlier decision in *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998), *cert. denied*, 529 U.S. 1052 (2000), the adult businesses had "unequivocally" "challenged and disproved the board's findings." *Id.* at 986. Accordingly, the Eleventh Circuit concluded that, in the language of *Renton*, "it was *unreasonable* for Defendants to have relied upon remote, foreign studies concerning secondary effects when the county's own current, empirical data conclusively demonstrated that such studies were *not relevant* to local conditions." *Id.* at 986 (emphasis added).

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[8]These studies, in their entireties, have been lodged with the Clerk of this Court by this *Amicus*.

The Eleventh Circuit also commented that, unlike *Renton*, this was not a circumstance where an adult business either did not exist or had just moved into town, and that the businesses in question in Fulton County had operated for nearly a decade. *Id.* Thus, "reliance" upon "foreign" studies was simply not necessary.

Yet, the Fulton County studies are not the only ones to dispel the assumption that the combination of adult entertainment and alcohol necessarily begets undesirable consequences. When the secondary effects doctrine was in its mere infancy, a study conducted in 1978 in St. Paul, Minnesota, reached the exact same result. *See*, excerpts attached at App. 53-64. That study represents the "most methodologically sound of all of the empirical research" constituting the older secondary effects studies, Bryant Paul, et al., *Government Regulation of 'Adult' Businesses through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, Communication Law and Policy, Vol. 6, No. 2, Spring, 2001 (hereinafter "*Paul*"), at 375, and is one of the myriad of studies that Petitioner's *amici* refer to as the "well-documented" proposition that "adult businesses engender undesirable secondary effects . . . ." Brief of Ohio and 24 States as *Amicus Curiae*, at 5.

Thus, the "common sense" does not apply to all places and in all circumstances. Perhaps businesses have changed, or perhaps other regulations remedy secondary problems (such as liquor license revocation for violations of lewdness regulations). Regardless, if the argument of *amicis* Capital Resource that "reliance on twenty-year-old studies is reasonable" (*Brief*, at 9) is to be taken literally, these reports, undertaken by *governmental* entities, would compel the conclusion that there is no basis whatsoever

for precluding, *anywhere*, nude dancing in places that serve alcoholic beverages.

Flanigan's Enterprises is not the only recent judicial decision to recognize the absence of secondary effects in regard to adult entertainment businesses. *See, e.g., Erie Boulevard Triangle Corporation v. City of Schenectady*, 2001 U.S. Dist. LEXIS 8807, at *3 (N.D. N.Y. June 29, 2001) (the court noting that it was "*undisputed*" that adult locations had existed in the City of Schenectady since 1973 "*without any identifiable impact upon the surrounding areas related to the operation of either plaintiffs' adult bookstores*") (emphasis added).[9]

Similarly, in *N.W. Enterprises, Inc. v. City of Houston*, 27 F.Supp.2d 754 (S.D. Tex. 1998), the district court was confronted by an initial adult zoning ordinance that required certain minimum distances between adult uses and specified protected land uses, and then an amendment to that ordinance that merely arbitrarily increased those distances. Both ordinances were enacted predicated upon the assertion of "secondary effects," although no new evidence was submitted to justify the increases of the buffering zones. *Id.* at 800-813. The district court ruled the amended zoning ordinance unconstitutional, in part as an impermissible content-based motivated regulation, *id.* at 810, and noted that

[9] *See also, Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985). There, the city council had received a memorandum from the city manager indicating that "there were no particular crime problems emanating from the topless establishments." *Id.* at 852. The memorandum referred to a study by the Pensacola Chief of Police, and stated that "[t]he police department cannot substantiate that problems occur any more frequently at topless bars than they do at non-topless bars. The question of municipal regulation, in this instance, relates to the moral issue involved, rather than the law enforcement issue." *Id.* at 853 n.1 (emphasis added).

there seemed to be specific interest during the committee hearings of an intention to close many, if not most, of the city's adult entertainment facilities. *Id.* at 812.

In addition, the court concluded that once having chosen its method of regulation, government could not increase those restrictions without justification. *Id.* at 811-12. Specifically, the court concluded that the legislative record did not demonstrate why the "earlier distance requirements" did not "adequately address the negative secondary effects previously found to exist," nor did it provide "any useful evidence or discussion regarding whether, since the time the previous distance requirements were adopted, sexually oriented businesses have continued to exert specific negative secondary effects . . . ." *Id.* at 813. *Accord, Erie Boulevard Triangle*, at *13-*14.

Another example of a municipality which ignored its own findings (similar to the circumstances in *Flanigan's Enterprises*) is that of Lakewood, Washington. There, the city uncovered the "depressing statistic" that there was absolutely no demonstrated connection between crime rates and adult entertainment establishments. App. 65.[10] Representatives of the municipality even tried "working this issue from a number of different angles" in order to construct a nexus between adult businesses and crime, but were unsuccessful. In reference to the attorney representing the adult businesses there (who was also counsel before this Court in *Renton)*, the memorandum notes: "Jack

[10] Undated memorandum of David Bugher, Community Development Director for the City of Lakewood, Washington, to Daniel Heid, City Attorney for the City of Lakewood, Washington, disclosed in discovery in the case of *Byran Clark v. City of Lakewood*, United States District Court for the Western District of Washington, Case No. C98-5341 RJB.

Burns will love this." *Id.* The city officials then adjourned into Star Chamber-like secret proceedings in an effort to "find" secondary effects, and then enacted a comprehensive regulatory ordinance of adult businesses. Finding the conduct of the City in these circumstances to have been reprehensible, the Ninth Circuit recently reversed a lower court decision dismissing a constitutional challenge against that ordinance. *Clark v. City of Lakewood*, 2001 WL 877062 (9th Cir. Aug. 6, 2001).

One additional recently issued opinion further exemplifies why the existence of secondary effects should not merely be irrebuttably "presumed." In *XLP Corporation v. The County of Lake*, 743 N.E.2d 162 (Ill. App. 2000), the Illinois Court of Appeals was asked to evaluate the propriety of a trial court having granted a motion to dismiss a lawsuit challenging various adult business licensing regulations. At issue there were two nude dancing establishments and two adult bookstores. *Id.* at 164. The plaintiffs had asserted in their complaint that because they had existed in the county for fifteen years, it was improper for the County to have relied upon, as a predicate for enacting the ordinance, studies "conducted by other municipalities regarding adverse impacts associated with adult uses," and that the defendant could not demonstrate the existence of any such secondary effects in the county or with regard to the plaintiffs' establishments. *Id.* at 166-67.

The Court of Appeals rejected the contention that mere recitation in the preambles of the ordinance to other studies of secondary effects was sufficient to carry the government's burden. *Id.* at 167. "In every case relied upon by defendant, the affected party had an opportunity to go to trial or to test the assertions of governmental interests in an evidentiary proceeding." *Id.* at 168. In

encapsulating the position argued here by this *Amicus*, the Illinois Court of Appeals addressed the *Renton* "reliance on the experiences of other municipalities" issue by noting:

> However, this conclusion by the *Renton* Court has to be considered in the context of that case. In *Renton*, there were no adult businesses in existence at the time the City enacted its ordinance. Consequently, the Supreme Court determined that the City of Renton could rely on the experiences of other communities, in particular those of Seattle, which had conducted detailed studies of adult use businesses, to adopt its ordinance. Here, however, where plaintiffs had been in business for 15 years at the time defendant enacted its ordinance, plaintiffs' allegation that defendant wrongly relied on outside studies instead of considering plaintiffs' existing businesses to determine whether such businesses cause adverse secondary effects presented an issue of fact.

Id. at 170.

The ability to litigate this "issue of fact" should be preserved by this Court, and a review of the oft-"relied upon evidence" further demonstrates why.

B. PEER-REVIEWED CRITICAL ANALYSIS OF THE "OLDER" SECONDARY EFFECTS STUDIES CASTS SIGNIFICANT DOUBT UPON THE ASSERTED NEXUS BETWEEN ADULT

ENTERTAINMENT ESTABLISHMENTS AND SECONDARY EFFECTS.

In its *amicus* brief in *Pap's*, the FALA presented a detailed analysis of the older type of "secondary effects studies" that municipalities rely upon in adopting regulations directed at sexually related expression. *See*, Brief and Appendix of the First Amendment Lawyers Association as *Amicus Curiae* in Support of Affirmance, No. 98-1161, at App. 1-29; 55-58. That analysis was penned by Dr. Daniel Linz of the Law and Society Program at the University of California, Santa Barbara. Both the plurality opinion authored by Justice O'Connor and Justice Souter's partial concurrence and partial dissent referred to those materials. *See*, 120 S.Ct. at 1396 (plurality); and 120 S.Ct. at 1404 n.3 (Souter, J., concurring in part and dissenting in part).

Dr. Linz presents a further paper here (in part analyzing the application of the 1977 Los Angeles Study to the "multiple use" regulations at issue here), which is found at App.1-42 and for clarification sake will be referred to here as "*Linz*."

There, Dr. Linz and Ph.D. candidate Mr. Bryant Paul explain that following the filing of their initial findings to this Court in *Pap's*, that paper was submitted at the Annual Meeting of the International Communication Association, 2000, and received a "Top Three Refereed Papers in Communication Law and Policy" award following peer-review. The paper was later subjected to further peer-review and was ultimately published as *Paul*, referenced *supra*. *Linz*, App. 5.

Double peer-review and subsequent publication certainly should lend at least some credence and weight

to the conclusions reached by Dr. Linz in light of the standards set forth by this Court for the admissibility of scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-95 (1993) (peer review and publication being factors that a federal judge can consider when determining the admissibility of expert witness testimony).

Following analysis of these older materials, and in particular the ten most commonly "relied upon" studies, Dr. Linz and Mr. Paul concluded that -- with few exceptions – their scientific validity is questionable and their methodologies are seriously and often fatally flawed, and that for those studies that were conducted in a credible manner, they demonstrated either no negative secondary effects associated with adult businesses or actually a reversal of the presumed negative effects (i.e., areas with adult businesses had *lower* crime rates and *higher* property values). *Paul*, at 386-87. These conclusions should permit parties affected by regulations directed at speech related activities to at the very least not only question, but to indeed litigate the factual claim that particular sexually related expression engenders some form of adverse secondary effects so as to warrant regulation thereof.

C. RECENTLY CONDUCTED STUDIES USING SOUND METHODOLOGY DO NOT SUPPORT AN ASSUMED CONNECTION BETWEEN ADULT ENTERTAINMENT ESTABLISHMENTS AND ADVERSE SECONDARY EFFECTS.

In his paper presented here, Dr. Linz moves beyond a mere critique of the "older" secondary effects studies, and analyzes and comments upon newer studies using proper scientific methodologies (including some

that he has participated in conducting) which demonstrate no such connection between adult uses and secondary effects.[11]

Initially, Dr. Linz establishes a set of criteria that he believes are questions that a court should ask in evaluating the credibility and relevance of (and thus "reasonable reliance" upon) any challenged secondary effects information. App. 7-13. Using these standards, Dr. Linz then analyzes the Fulton County studies underlying the Eleventh Circuit's decision in *Flanigan's Enterprises*, and notes that they (of course) fail to demonstrate a connection of either crime or urban blight to adult entertainment establishments. App. 27-28.

Dr. Linz further discusses recent crime and property value studies conducted in relation to adult businesses in Charlotte/Mecklenburg County, North Carolina. App. 28-31. The property value study showed that there was "no evidence that negative secondary effects on house price appreciation can be found in two decades of housing transactions in Mecklenburg County." App. 29. The crime study, conducted primarily by Dr. Kenneth Land of Duke University and utilizing data from the United States Department of Justice Office of Community Oriented Policing Services, concluded that in *all six* of the crime categories investigated,[12] the overall numbers of crime incidents for all three years combined were "*substantially less* in the areas surrounding the adult nightclubs than in the areas surrounding the control (non-adult) sites." App. 31 (emphasis in original).

[11] All of these studies have been lodged with the Clerk of this Court.

[12] Total crimes; total Uniform Crime Reports Index Crimes; Total Uniform Crime Reports Violent Crime Index Crimes (murder, rape, aggravated assault, robbery); Total Uniform Crime Reports Property Crime Index Crimes (burglary, larceny, theft, motor vehicle theft, arson); Sex Crimes; and all other crimes. App. 31.

Also commented upon by Dr. Linz is a study of crime that he conducted in Ft. Wayne, Indiana, concerning the exotic dance clubs[13] there. App. 32-34. His conclusion was that there was "no empirical evidence of the existence of adverse secondary effects, in the form of crime, surrounding exotic dance businesses in Ft. Wayne." App. 33.

III. A CRITICAL EXAMINATION OF THE 1977 LOS ANGELES SECONDARY EFFECTS STUDY FAILS TO DEMONSTRATE ANY CONNECTION BETWEEN ADULT BUSINESSES AND ADVERSE SECONDARY EFFECTS, OR JUSTIFICATION FOR THE ORDINANCE AMENDMENT AT ISSUE.

In addition to the arguments of the parties in this action, this Court has at its disposal at least two other analyses of the 1977 Los Angeles study that supposedly served as the basis for the zoning amendments at issue. *Paul* indicates that "[t]his study is perhaps the most often *incorrectly referenced* of any empirical research investigating the effects of adult-oriented businesses on surrounding areas." *Id.* at 377 (emphasis added). An abbreviated discussion of that study notes no objective findings of the existence of secondary effects. *Id.* at 377-379.

Here, Dr. Linz and Mr. Paul provide a more comprehensive analysis (App. 13-25) and remark that a portion of the study actually showed *higher* property values in adult areas than non-adult control areas; that the methodologies used in most portions of the study were flawed; and that there was no objective evidence

[13] Those establishments require entertainers to wear "pasties and G-strings" consistent with this Court's decision in *Barnes*. App. 32 n.8.

produced that established a connection between adult entertainment establishments and negative secondary effects. *Id.* In addition, they discuss the portion of the 1977 study which the Ninth Circuit apparently relied upon for its conclusion that there was *some* evidence of a connection to secondary effects, and note that this "special" police department study does *not* establish a nexus between adult entertainment establishments and higher crime rates, but merely observes that the Hollywood area of Los Angeles had a higher crime rate than the remainder of the city. App. 22-25. Most importantly, they conclude that the 1997 report contains no information justifying the "multiple use" ordinance amendment. App. 25.

IV. WHY THIS COURT SHOULD NOT PERMIT MERE DEFERENCE TO THE "OLD" "SECONDARY EFFECTS STUDIES" IN ALL CIRCUMSTANCES.

Amici Capital Resource Institute assert that the determination of whether adult entertainment establishments create secondary effects should be a question determined as a matter of law, and that "reliance on twenty-year-old studies is reasonable." Brief of Capitol Resource Institute, et al., as *Amici Curiae*, at 5, 9. Basically, what they contend (and the other *amici* do not appear to dispute) is that because there are "old" studies supposedly "documenting" a relationship between certain forms of adult entertainment establishments in the past and secondary effects, the Court should determine that *for all time and in all circumstances* in regard to any form of sexually related expression, this "connection" is a legal "given" that should never be subject to challenge. For the following reasons, this Court should reject such a drastic departure from its previous First Amendment jurisprudence.

First, even under low level scrutiny, this Court has long noted the ability to challenge the legislative predicates of governmental enactments. "[N]o pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis." *United States v. Carolene Products, Co.*, 304 U.S. 144, 152 (1937). And, certainly, there should be a greater ability to refute such legislative assertions under intermediate or higher First Amendment scrutiny. *See, e.g.*, the unanimous opinion of the Court authored by then (now Chief) Justice Rehnquist in *Los Angeles v. Preferred Communications*, 476 U.S. 488, 494-96 (1986). Yet, the standard which the Petitioner and its *amici* urge this Court to adopt would, without question or justifiable basis, reverse these long-standing precedents of the Court.[14]

Second, the older secondary effects studies that governments tend to "rely" upon do not necessarily reach the type of conclusions regarding a connection between adult entertainment establishments and secondary effects that the regulatory proponents assert they so hold. Certainly, as has been discussed, *supra*, the 1977 Los Angeles study, the 1978 St. Paul study, and the more recent Fulton County studies specifically and explicitly in numerous regards *disclaim* such a nexus. The goal of the courts is, after all, the ascertainment of truth, and the

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[14] Compare, *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250 (3rd Cir. 1986), in which new factual evidence led that court to invalidate, on First Amendment grounds, a solicitation ordinance which it had upheld only two years earlier in *Pennsylvania Alliance for Jobs and Energy v. Borough of Manhall*, 743 F.2d 182 (3rd Cir. 1984).

methodological deficiencies of the oft-relied upon studies as discussed in detail in *Paul* alone should cause courts to question, and permit litigants to attempt to refute, any asserted relationship between expression (or places thereof) and secondary effects.

Third, such deference would ignore the efficacy of previously enacted regulations and preclude a court from ever asking the question of "when is enough enough?" Lost in the numerous arguments of the Petitioner and its *amici* is any discussion of the effect that the earlier L.A. zoning regulations may have had in ameliorating secondary effects; which, after all, was *supposedly* the entire purpose of enacting those provisions in the first place.

"Experimentation" in the language of *Renton* (475 U.S. at 52) and *Young* (427 U.S. at 71) presupposes, of course, an examination -- at some point -- of whether a particular modality of regulation "works." Yet, Petitioner and its *amici* are in an interesting logical predicament, in that they assert that ever-more restrictions of adult businesses will be necessary in order to alleviate supposed adverse secondary effects, but they never want to examine, or even permit a court to investigate, whether previously enacted regulations corrected the problems that the government asserts existed in the past. In fact, regulating on the basis of secondary effects after earlier legislation had already been passed to control such perceived problems (as Los Angeles has done here), requires the government to adopt the bizarre assumption that their initial law was ineffective and had no substantial impact upon secondary effects. This then circuitously leads to the further conclusion that the prior regulation was not justified in the first place as it did not fulfill the second prong of *O'Brien*.

Fourth, to eviscerate any form of judicial review in regard to the existence of, or legitimate concern over, secondary effects as a necessary predicate for the enactment of laws directed to regulate -- if not out-right ban -- certain forms of expressive activities, will inevitably lead to the pretextual passage of legislation predicated upon the dislike for the *content* of certain expression, as opposed to the supposed negative by-products of such speech and conduct. Numerous courts have certainly found that this has already occurred. *See, e.g., Krueger*, 759 F.2d at 853 n.1; *N.W. Enterprises*, 27 F.Supp.2d at 812. *See also, Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1281 (11th Cir. 2001) (anti-nude entertainment statute appeared to be "at first blush" intended to suppress the message and content of expression as opposed to dealing with secondary effects).

Irrebuttably presuming the existence of secondary effects gives the government *carte blanche* ability to regulate and indeed ban speech and expression merely by muttering the two magical words. Yet, with now a full quarter century of experience post *Young* of zoning regulations prescribing the location of adult businesses based upon the concern of secondary effects, and ten years experience since *Barnes* gave government the right to prohibit nude performance dance entertainment predicated upon the same concerns, there is now existing a lengthy and detailed history of the efficacy of such regulations.

Expanding restrictions of sexually related expression at this point -- without demonstration of continuing or further problems emanating from such activities (such as is exemplified by the actions of Los Angeles here and the other ordinances and statutes

discussed, *supra*) -- is not, *Amicus* submits, further "experimentation" to address the perceived problems of secondary effects, but is, rather, simply experimentation meant to drive certain speech and expression from the marketplace by the creation of such a suffocating array of regulations that no business could operate thereunder. This concern is particularly exemplified by the circumstances in such cases as *Flanigan's Enterprises* and *Clark*, where government searched far and wide for secondary effects, found no problems, but enacted additional regulations anyway.

When it can be argued that a regulation of speech or expression has been enacted for pretextual reasons, heightened constitutional scrutiny is mandated.[15]

V. STANDARDS THAT THIS COURT SHOULD UTILIZE IN PROVIDING DIRECTION TO LOWER COURTS IN THE EVALUATION OF SECONDARY EFFECTS INFORMATION.

Certainly, no one contends that secondary effects information must first pass muster under the *Daubert* standard before it can be "reasonably relied" upon by a

[15] *See, e.g., Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986)(if a city were to use an otherwise neutral law "as a pretext for closing down a bookstore . . . because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review")(O'Connor, J., concurring); and *Young*, 427 U.S. 71 & n.35 (in rejecting a constitutional challenge to the Detroit zoning ordinance, the plurality noted that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech," and observed that the District Court had found that "[t]he Ordinances do not affect the operation of existing establishments but only the location of new ones")(plurality).

municipality as a predicate for enacting regulations. *Linz*, App. 7; *Paul*, at 370-71. *See also, Nixon v. Shrink Missouri Gov't. PAC*, 528 U.S. 377 (2000).[16] However, the decisions referenced, *supra*, illustrate that courts are now being confronted with *evidence*, in light of the plurality's comments in *Pap's*, seeking to dispel the assertion that adult entertainment establishments are associated with such adverse consequences. Because this issue will continue to engender litigation in the future, *Amicus* FALA believes that this Court should provide some minimal guidance to the lower courts in evaluating secondary effects information in light of the *O'Brien* test.

In their attached paper, Dr. Linz and Mr. Paul provide, and describe in detail, a four-part analysis that they believe should be engaged in by courts when evaluating challenged secondary effects information. A study, they opine, should be examined in order to determine whether it answers or violates the following principles: 1) "Compared to what?" 2) "Is this just a one-time fluke?" 3) "Is crime measured according to a reliable source?" and "Did the government go looking for more crime to justify its legislation?" and 4) "Did the investigators talk only to people who would give them answers they wanted to hear?" App. 10.

The relevance and utility of these four questions is discussed at App. 7-13, 38-42, and *Amicus* urges this Court to adopt these standards as guidelines for courts to utilize when confronted with a challenge to the predicate argument of secondary effects as being a basis to justify

[16] Nevertheless, evidence -- and not mere speculation -- is mandated. *See, e.g., Renton*, 475 U.S. at 51-52 (. . . "so long as whatever evidence the city relies upon . . . .") (emphasis added); and *Young*, 427 U.S. at 71 ("the record discloses a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect") (plurality) (emphasis added).

regulations impacting upon speech and expression related activities.

VI. CONCLUSION

Amicus FALA urges this Honorable Court to affirm the decision of the Ninth Circuit, to reject any contention that "secondary effects" can be irrebuttably presumed to exist, and to reject the argument of the Petitioner and its *amici* that virtual rational basis scrutiny should be applied in circumstances such as the one at bar.

Respectfully Submitted,

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PAPER ON THE APPLICABILITY OF THE 1977 LOS ANGELES SECONDARY EFFECTS STUDY AS A BASIS TO JUSTIFY THE PRECLUSION OF "MULTIPLE USE" ADULT BUSINESSES, AND AN ANALYSIS OF MORE RECENTLY CONDUCTED "SECONDARY EFFECTS" STUDIES.

BY:
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AND
BRYANT PAUL[**]

PRESENTED IN SUPPORT OF THE AMICUS CURIAE BRIEF OF THE FIRST AMENDMENT LAWYERS ASSOCIATION

INTRODUCTION

In its decision now under review by this Court, the Ninth Circuit ruled that the City of Los Angeles had a substantial governmental interest in reducing neighborhood crimes that were presumably associated with the existence of "adult" businesses. *Alameda Books, Inc. v. City of Los Angeles,* 222 F.3d 719 (9th Circuit 2001), *cert. granted.*

The primary evidence propounded by Los Angeles to establish this concern, and to then justify a subsequent prohibition of "multiple use" adult businesses, was a 1977 study undertaken at the request

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of the City Council by the city's Department of Planning in cooperation with the local police department.

At issue for the Ninth Circuit was the question of whether the latter regulations devised by the City were designed to serve this governmental interest. In the case now before it, the Court will examine just what interests are implicated by the 1977 LA Study, and evaluate whether the Study could factually serve as a basis for enacting the 1983 ordinance amendments that prohibit the establishment of "combination" businesses.

In this paper, we attempt to aid the Court in examining these questions, while also seeking to provide further information to the Court concerning its more general consideration of the "secondary effects" doctrine.

Our analysis consists of the following:

First, we establish that the most frequently cited secondary effects studies, including the 1977 Los Angeles Study, show no objective evidence of a relationship between the existence and/or concentration of adult businesses and negative secondary effects. This raises the question of whether there is an appropriate foundation for enacting, under the justification moniker of "secondary effects," an ever-widening array of regulations directed at "adult" businesses.

Second, we set forth certain scientific, and indeed common sense, criteria that we believe should be used in order to evaluate whether any specific "secondary effects" study can be expected to have sufficient trustworthiness so that its results can be reasonably relied upon as the basis for legislative

decisions. We offer these requirements as reasonable thresholds that we believe should be transcended when considering allegations of "secondary effects" as a basis for legislation. These thresholds or critical questions that may be asked about a study will permit the Court to distinguish objective and fair assertions of the existence of secondary effects from mere unfounded allegations.

Third, we engage in a critical review of the 1977 "secondary effects" study undertaken at the request of the Los Angeles City Council *in light of these basic requirements* for reasonable reliance on a study's findings.

We attempt to determine: What secondary effects, if any, were found to be associated with "adult" establishments in the City of Los Angeles. Our review of this study finds that in most respects, that study *does not* establish a connection between the existence of an adult business and increases in crime and urban blight and decreases in property values. We find that the study does not even demonstrate the *general* effects of increases in crime or decreases in property values as the result of the concentration of such businesses -- inapposite to the claims of Los Angeles -- much less the *particularized* effects concerning combinations of such businesses at the same location.

We further find that in those few instances where a connection is alleged or implied, the conclusions are predicated upon unscientific and/or flawed methodology so facially apparent that no court should be able to conclude that a legislative body could have reasonably relied upon it as a basis for enacting certain regulations. Because of the lack of true findings in regard to a connection between adult businesses and

negative secondary effects and the significant methodological flaws found in the 1977 Study, we conclude that there is certainly no sufficient justification for the City of Los Angeles to be able to utilize that Report in order to preclude "multiple use" adult businesses.

Fourth, we synopsize and review for this Court a series of more recently conducted "secondary effects" studies of adult businesses that *do* meet the basic requirements for reasonable reliance. These studies have been undertaken at the behest of not only the business establishments involved, but also by at least one local government seeking justification to regulate adult facilities. They measure the impact of long-existing exotic dance facilities in: 1) Fulton County, Georgia (also reported in *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001)); 2) Charlotte/Mecklenburg County, North Carolina; and 3) Fort Wayne, Indiana. Unlike the Los Angeles 1977 Study, these investigations are based on sound scientific methodologies and the results obtained therefrom are imbued with sufficient trustworthiness so that they can be relied upon for legislative decision-making.

Having laid this foundation, we then address the City of Los Angeles' contention that the findings of the 1977 Study can be applied to the distinct question of the effects of combination-type business, such as Alameda Books and Highland Books.

Finally, we address the policy implications for the secondary effects doctrine raised by our analyses contained herein.

ANALYSIS

I. The Ten Most Frequently Cited Secondary Effects Studies, Including the 1977 Los Angeles Study, Show No Objective Evidence of a Relationship Between a Concentration of Adult Businesses and Negative Secondary Effects.

As we established in our Appendix to the First Amendment Lawyers Association *Amicus Brief* submitted to this Court in *City of Erie v. Pap's A.M.*, studies conducted pursuant to sound methodological principles demonstrate no correlation between the presence of certain adult businesses and the existence of surrounding negative secondary effects (such as increases in the incidence of prostitution and violence). *See*, City of Erie v. Pap's A.M., 120 S. Ct. 1382, 1403 n.3 (2000) (Souter, J., dissenting). *See also*, Brief for First Amendment Lawyers Association as *Amicus Curiae*, 16-23, at App. 1-29.

Following submission of our analysis of these oft-utilized secondary effects studies to this Court, we undertook to expand upon that review, which resulted in a paper submitted to the Annual Meeting of the International Communication Association, 2000, which received a "Top Three Refereed Papers in Communication Law and Policy" award following peer-review. That analysis was then subjected to further peer-review and ultimately published as a paper entitled Governmental Regulation of 'Adult' Businesses through Zoning and Anti-Nudity Ordinances; Debunking the Legal Myth of Negative Secondary Effects, *Paul, et al. Communication Law & Policy, Vol. 6, No. 2, Spring, 2001, pp. 355-391.*

In examining the history of the uses of these studies by municipalities, we found a consistent tendency to incorrectly assume that these studies, as a group, showed evidence of problems attributed to adult facilities. Municipalities tended to inappropriately equate the simple fact that a "study" had been undertaken with positive evidence of a relationship between adult businesses and negative secondary effects in a community. Most municipalities never considered the methodological validity of these studies, nor did they even appear to have critically examined the studies in order to determine their true findings. In fact, two of the ten "studies" most frequently cited by government bodies in regard to regulating adult businesses (Detroit, MI and Beaumont, TX) were not empirical data collection efforts at all, or even testimony from citizens, but merely reports discussing recommendations concerning the regulation of adult uses. *Paul, et al.*, at 386.

According to our previous analyses, the 1977 Los Angeles Study is the third most frequently used study by municipalities as a basis for regulating adult businesses. However, as we have noted, the authors of the 1977 Study themselves actually claimed to find *no* causal relationship between adult businesses and decreases in property values. Further, we identified serious methodological problems associated with the Los Angeles Police Department's investigation of the supposed relationship between adult businesses and certain types of criminal activity. Therefore, we concluded that the 1977 L.A. Study did not offer even the most rudimentary form of scientifically reliable evidence of a relationship between adult uses and any form of negative secondary effect. *Paul, et al.*, at 378-379.

Contrary to our assertions, however, Los Angeles not only believed that their Study found a relationship between the concentration of adult businesses within the Hollywood section of the city and negative secondary effects, but it now contends that it is reasonable to extend the findings of that Study to the question of the effects of individual combination-type businesses, such as Alameda Books and Highland Books.

Obviously, it is important to address the City's contention that the findings of the 1977 Study can be applied to this new question. We address this in **Part V** of the paper.

However, before doing so, we lay a foundation in **Part II** where we first develop a set of threshold issues that should be evaluated in order to determine whether a "secondary effects study" can be reasonably relied upon as a justification for the enactment of laws and regulations; in **Part III** where we then describe in greater detail and in light of these principles, why the Los Angeles Study contains no scientifically reliable evidence of a relationship between even the *existence* of adult businesses and negative secondary effects in the first place; and in **Part IV** where we contrast that study with more recently conducted investigations which – given the employment of sound methodology – we believe then contain reliable results.

II. The Basic Requirements for Reasonable Reliance on Evidence Obtained From a Study of the Secondary Effects of Adult Businesses.

In our appendix to the *Pap's* amicus brief and as contained in our recently published paper, we analyzed

the most frequently cited secondary effects studies in light of a list of criteria that we believed are critical in order for such evidence to meet the standards of scientific reliability as defined by this Court in *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). *See, e.g., Paul, et al.*, at 355-391.

Of course, we do not contend here that a municipality cannot rely upon a secondary effects study as a basis for legislation unless and until that report has been found to have met the elastic *Daubert* standard. Rather, we provide criteria for a court to utilize in determining whether a municipality can justifiably rely upon such a study as a basis for enacting regulations of adult entertainment establishments, or in the particular words of this Court in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), whether a court can constitutionally conclude that a particular study is "reasonably believed to be relevant to the concerns that the municipality meant to address." *Id.* at 51-52.

Succinctly put, we contend that before a municipality can justifiably or reasonably rely upon a particular study as a basis for enacting restrictions on First Amendment freedoms, that study must have at least a modicum of scientific validity (and therefore reliability), and be shown to be relevant to the proposed legislative enactments. However, as we note below, the procedures used to insure scientific validity and reliability do not differ substantially from plain English principles that we intuitively apply to our everyday decision-making.

We have reviewed in our published paper a list of factors derived from the *Daubert* standards. We note there that a municipality need not necessarily be held to

each of those criteria when legislating. *Paul, et al,* at 370-371. We do contend, however, that at least two of the *Daubert* factors: 1) design of the study so that an error rate can be calculated; and 2) adherence to professional standards in using techniques or procedures (most of which are designed to aid in the calculation of an error rate), should be found by courts to be procedural prerequisites in order for municipalities to be able to utilize them as a basis for regulating expression. These factors insure "evidentiary reliability."

Without this reliability, there is no basis to determine whether there is a substantial or important governmental interest involved, whether a specific piece of legislation is "necessary" in order to further that interest, or whether it is "reasonable" for a municipality to rely upon such a study as a basis for enacting legislation. *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968); *Renton*, 475 U.S. at 51-52.

In a scientific study, the error rate refers to the probability of accepting a result as true, when it is in fact false. It is an indication of the reliability of a finding. *See, Paul,* at 371, for a technical description of how to calculate such a rate. The results of properly conducted surveys, experiments and quasi-experiments are always couched in terms of an error rate. Professional standards that aid in the calculation of an error rate have been devised by scientists in a particular area of inquiry is, consequently, also necessary in order to insure methodological integrity and thus the validity of a study. *See, Paul, et al.*, at 370-372.

Based upon our investigation of the literature and studies both past and recent, we have identified four

methodological criteria that facilitate adherence to professional standards of inquiry that we believe should be considered before a court could conclude that such a report could be reasonably relied upon in order to justify enactment of a certain regulation.

A study of secondary effects should be examined in order to determine whether they answer or violate the following principles:

(1) "Compared to what?" (2) "Is this just a one-time fluke?" (3) "Is crime measured according to a reliable source?" and "did the government go looking for more crime to justify its legislation?" and (4) "Did the investigators talk only to people who would give them answers they wanted to hear?"

These criteria are neither difficult nor cumbersome to apply, nor are they novel in nature. We apply these standards, in an intuitive fashion, when making routine decisions every day. For example, who among us does not ask, when trying to guess the reliability of a new car we are about to purchase: How does the car we are considering compare to a Ford, or a Toyota? If we owned a car from that manufacturer in the past and it broke down, was that a one-time fluke or is this a consistent pattern with this brand? Are we sure we are not trying to convince ourselves that the car is more reliable than it is because the car is fast and is a convertible? Finally, would we listen only to the car sales person about the reliability of the vehicle or would we seek an objective selection of opinions about the car?

A. "Compared to what?"

Crime rates have been shown to be associated with a concentration of various groups of individuals and businesses.[1] Other things being equal, there are apt, for example, to be more crimes in a densely populated urban area than an undeveloped track of land where people, and therefore "targets," are few and far between. Accordingly, the question that should be asked is not whether there is *any* history of crime in the areas surrounding an adult business (since virtually all business establishments where the public congregates, adult and non-adult alike, will demonstrate to some degree this "connection"), but rather whether there is *more* crime in areas surrounding adult facilities than other type of business establishments situated in comparable areas. The same is true for property values and economic blight. An adult business may be placed, for example, in a depressed area pursuant to zoning requirements, but that factor, in-and-of-itself, does not establish that the adult facility somehow *caused or exacerbated* urban blight and the decrease of property values.

Accordingly, in order to insure that accurate and fair comparisons are being considered, a control or

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[1] P. A. Engstad. Environmental Opportunities and the Ecology of Crime: Crime in Canadian Society (1975); D. C. Duffala. Convenience stores, armed robber, and physical environmental features. American Behavioral Scientist, 20: 227-246. (1976). Dennis W. Roncek and M. A. Pravatiner. Additional evidence that taverns enhance nearby crime. Sociology and Social Research, 70; 185-188; Richard Block and Carolyn Block. Space, place, and crime: Hot-spot areas and hot places of liquor-related crime. In Crime and Place, edited by J.E. Eck and D. Weisburd. Vol. 4 of Crime prevention studies. Monsey, New York: Criminal Justice Press.

comparison area must be selected that is truly "equivalent" to the area(s) containing the adult entertainment business(es). We have previously elaborated on the factors that may ensure equivalence and the calculation of an error rate in the test of differences between the adult and control areas. *Paul*, at 373.

B. "Is this just a one-time fluke?"

A sufficient period of elapsed time, ideally both prior to and following the establishment of an adult entertainment business, is necessary when compiling data in order to ensure that the study is not merely detecting an erratic or aberrant pattern of social activity. Generally, the longer the time period under study, the more stable and reliable (and more valid) the estimates of secondary effects.

C. "Is crime measured according to a reliable source?" and "did the city or the police go looking for more crime?"

The crime rate in a secondary effects study must be measured according to the same valid source for all areas considered. Although we describe this concern in detail in *Paul*, at 373-374, it is especially important that the measurement of crime be factually valid and reliable, such as a daily log kept by police of calls for service, or a compilation of the number of actual arrests. In addition, researchers should also acknowledge changes in police surveillance techniques once adult entertainment businesses have been established in a particular community, as well as during the period that a secondary effects study is being undertaken. Obviously,

increased surveillance of an area will have an impact on the amount of crime "detected" by the police.

D. "Did the investigators talk only to people who would give them answers they wanted to hear?"

Survey research, if relevant to the question of adverse secondary effects at all, must be properly conducted. Historically, most such inquiries involve asking real estate professionals, local property owners, law enforcement officers, and/or community residents to *opine* as to the effect that the presence of an adult business would have on a particular community. Less frequently, surveys of citizens' perception of crime and victimization are undertaken. While subjective surveys may provide us with a sense of the general *opinion* of a particular group regarding the impact of adult entertainment businesses on surrounding neighborhood property values or criminal activity, they do not provide sound evidence of a relationship between these businesses and the actual impacts on the surrounding areas.

Even if some survey research may be relevant to the issue at hand, it must be properly conducted in order for the researcher to calculate an error rate. Professional standards do exist for performing methodologically valid social scientific survey research so that it possesses some degree of reliability and trustworthiness. Adherence to these standards is essential if researchers hope to obtain legitimate unbiased survey results. We discuss these in *Paul, et al.*, at 374.

III. The 1997 Los Angeles Study Authors Themselves Claim to Have Found No Evidence of a Causal

Relationship Between Adult Businesses and Decreases in Property Values, and at Best Claim Only an Equivocal Relationship with Crime. More Importantly, this Equivocal Relationship is Based Upon a Flawed Comparison and is Predicated Upon a "Special Policy Study" Undertaken in Order to Ferret Out More Crime. In addition, the Study Does Not Contain the Requisite Attributes to Allow It to be Reasonably Relied Upon.

The 1977 LA Study report is a combination of four separate research endeavors, each of which will be discussed in terms of our threshold questions.

A. The City Planning Department investigating the effects of concentrations of adult businesses on area property values reported that they did *not* find any consistent increase or decrease in property values associated with adult businesses.

In this portion of the Study, the researchers, asking the "compared to what" question, compared changes in property values from 1970-1976 for five "study" areas (those containing concentrations of adult businesses) and four "control" or comparison areas (those containing no such concentrations).

The six-year time span between 1970 and 1976 is significant in that the authors claim it represented a period of substantial increases in the number and concentration of sexually oriented adult businesses in the study areas specifically, as well as throughout the city in general.

The study findings showed little differences between the study and comparison areas.

This lack of difference leads the researchers to state: "On the basis of this comparison, it cannot be concluded that properties containing concentrations of adult entertainment businesses have *directly* influenced the assessed valuations of such properties."[2] It is interesting to note that the authors of the study underlined the word "directly." The authors may have wished their readers to "read between the lines" and conclude that they may have found evidence of an "*indirect*" influence of adult business concentrations on property values. Yet, no such evidence is offered anywhere within the study.

And, while there are procedural problems with this portion of the study many aspects of it actually show *higher* property values in the adult areas than the non-adult control areas (one set showing a 400 percent greater increase). Such findings are directly opposite to the assumption that these studies (and in particular the 1977 LA Study) stand for the proposition that the existence of adult businesses, or at least a concentration thereof, reduce property values and increase urban blight.

Although containing some methodological flaws, this first study represents the strongest (most methodologically sound and therefore most reliable) of the four sections of the report from a scientific perspective. Yet, the results suggest that no such relationship between a concentration of adult uses and secondary effects exists.

B. The second part of the 1977 LA Study claims to have found that *public opinion* is strongly opposed to the operation of adult businesses. Yet, such a

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[2] 1977 LA study at 2 (emphasis in original).

"study," even if performed correctly, does little more than attempt to gauge subjective opinions. It does not answer the question of whether adult businesses *cause* adverse secondary effects. And, in any event, the public opinion polling undertaken by the City does not meet the professional standards for performing methodologically valid, reliable and trustworthy social scientific survey research.

We will leave it to others -- the lawyers -- to discuss the question of whether public opinion, even if appropriately and accurately measured, can ever serve as the basis of the suppression and/or regulation of speech and expression related activities. However, even if public opinion were to have some relevance to a secondary effects analysis, our review of this portion of the 1977 LA Study leads us to conclude that any results would be of little to no scientific relevance because of the methodologies used.

Two versions of a survey were administered in this part of the study to determine public opinion concerning adult businesses. The first survey was given to residents and property owners who lived and/or worked within 500 feet of any of the five study areas. This survey yielded a return of only 581 of the 3600 questionnaires, or a 16 percent rate. A separate survey was sent to all of the members of the American Institute of Real Estate Appraisers having a Los Angeles address and also to members of the California Association of Realtors whose offices were located in the vicinity of the study areas (retained from the first section of the report). Only 81 of the 400 questionnaires (or 20 percent of those sent out) were returned.

In both cases, the response rates of these surveys fall well below the acceptable professional standards (a

professional rule of thumb is that a response rate of 50 percent is adequate for analysis and reporting; a response rate of 60 percent is good; and, a response rate of 70-75 percent is very good).[3]

Low response rates such as those in the 1977 Los Angeles Study indicate the presence of a high response bias. In other words, the City may have only heard from people who were motivated to complain about the presence of adult businesses and used the questionnaire to voice their opinion.

Compounding the bias even further, a large portion of the residents and property owners who returned questionnaires were given the questionnaires at two town meetings held to discuss the "problem" of adult businesses.[4]

In the end, such a collection of respondents is surely not a randomly chosen sample from the population of people who reside near adult businesses, with each person having an equal chance of being chosen for the study. Without obtaining a random sample of respondents from the community, the study authors cannot calculate an error rate and, as such, the reliability of any of their findings cannot be determined. And, here, the survey appears to have been conducted in a gerrymandered fashion in order to obtain the desired results.

In summary, the researchers (the City Planning Department) failed to adhere to minimum professional standards by failing to conduct the study in accordance with proper survey techniques.

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[3] See Earl Babbie, The Basics of Social Research 240 (1999).
[4] 1977 LA study, at 32 n.4

Finally, even if the opinion poll had been conducted in a scientifically sound manner, the research reported in this section does not answer the question of whether concentrations of adult businesses *cause* adverse secondary effects.

Survey opinions cannot replace the evidence supplied by objective comparisons of (for example) property values and/or crime statistics compiled within areas containing adult entertainment businesses, with those garnered from areas containing no such businesses.

C. The third section of the report discusses the results from a 1974 "cluster" analysis performed by the City of Los Angeles Community Analysis Bureau (CAB). However, the City's own analysis for the Hollywood area belies the idea that crime is higher near adult businesses. For other geographical areas, study and control area sites were so incomparable on several key population and economic characteristics as to invalidate legitimate crime comparisons.

This section of the report attempts to determine if the presence of adult businesses is related to criminal activity by comparing areas with adult businesses to areas that did not contain such businesses. The CAB's "cluster" analysis entailed grouping each of the City of Los Angeles's 750 census tracts (the smallest geographical area for which information of residents is collected on a regular basis) into a smaller set of 30 "clusters," or combinations of tracts.

To accomplish this "clustering," the CAB examined each census tract on 66 census variables that

they had deemed to be the most accurate descriptors of the tracts. Importantly, five of the variables used by the CAB to group the tracts into clusters were crime variables. These included: the number of assaults per 100 population, robberies per 100 population, burglary per 100 improved parcels, total arrests per 100 population and narcotic arrests per 100 population aged 14 – 44.[5]

The clusters were also grouped by real estate value variables such as approximate median value of owner occupied units and approximate median monthly rent of renter occupied units.

The authors then statistically compared these clusters that encompassed the adult and comparison areas (three adult areas and three control areas were compared in the Hollywood region of Los Angeles and two adult areas in the North Hollywood and Studio City region were compared to one control area in the San Fernando Valley).

It should be noted that at this point something extraordinary was found. The study authors admit that all of the tracts that were included in the Hollywood adult business areas *and* in the control condition areas were, statistically speaking, identical to each other. The importance of this finding cannot be overstated. It establishes that when undertaking precisely the statistical test that would most reliably yield knowledge of whether the Hollywood census tracts containing adult businesses have higher rates of crime than comparable tracts that do not contain adult businesses, no such higher rates were found.

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[5] 1977 LA study, at 44 n.4, 49.

According to this test, then, performed by the City itself, the adult business areas and control areas were more similar to each other, in terms of crime, than they were to any other region of the city. In other words, despite the concentration of adult businesses operating within the study areas in Hollywood, those areas with adult businesses were actually more similar to the control areas than they were to other areas in the city.[6]

These findings are *exactly contrary* to what would be expected if there was a connection between adult businesses in Hollywood and the adverse secondary effects of increased crime and decreased property values.

The other two adult business areas (North Hollywood and Studio City) and the one remaining comparison area fell across eight separate census tracts that each fell into one of six different clusters. The implication here is that these adult and comparison areas were actually poorly matched. Specifically, the study and control areas were significantly disparate on several key population and economic characteristics that could influence both crime rates and real estate values (irrespective of the presence of an adult facility). Any differences found between them regarding crime rates or property values is more than likely the result of one or more factors normally associated with criminal activity, rather than the presence or absence of adult businesses.

Nonetheless, regardless of these substantial problems in matching study and control areas, or perhaps because of them, no reliable pattern of differences on the crime rate variables could be found

[6] 1977 LA study, at 45-46 n.4.

between and the areas with concentrations of adult entertainment businesses and those without such concentrations.

For example, the number of assaults per 100 persons in the population was *lower* in the adult business area clusters (.46 and .37) than the control area clusters (.48). The robbery rate for one of the study area cluster groups (.17) was *equal* to that for the control area clusters (.17), while the other study area cluster groups were found to have a higher robbery rate (.267) than the control. Burglaries per 100 improved parcels were found to be *substantially lower* than the control area clusters (13.50) for one of the adult area cluster groups (10.94) and slightly higher for the other (13.86). Total arrests per 100 persons in the population were found for both of the study area clusters to have an insignificantly higher rate (4.2 & 4.2) than the control area (4.1). Narcotics arrests per 100 persons in the population were found to be *lower* for the North Hollywood study area cluster groups than the San Fernando Valley control clusters (1.6), but higher for the Studio City study cluster groups (2.66).

Taken as a whole, then, we may note that out of the ten comparisons made between the adult and control areas on crime statistics reported for the Studio City and North Hollywood regions (utilizing these ill-matched areas for comparison purposes), four found higher crime rates in control (non-adult) area clusters, one found no differences between study and control area clusters, and five demonstrated higher crime rates in the adult area clusters. These findings provide no evidence of an actual relationship between the concentration of adult entertainment businesses and the negative secondary effect of increased crime.

The findings in this section represent the results of the most scientifically sound examination of the relationship between concentrations of adult businesses and criminal activity offered in the entire 1977 LA Study. Only in this section of the report does the City attempt to compare criminal activity in areas containing concentrations of adult businesses (study areas) with properly matched comparison areas containing no such concentrations.

Having found, however, no reliable evidence of differences in crime or property value decreases in areas containing adult businesses, the City then turned to a "special" police study of the Hollywood area.

D. The final section of the Los Angeles Study report focuses on the results of a "special" police department study that was intended to compare the occurrence of certain types of criminal activity in the Hollywood area with the rate of such activity throughout the rest of the city. The first problem with this "study" is that the police admit to stepped-up police surveillance in the Hollywood area between 1969 and 1975, but admit there was no such surveillance increase for the rest of the city.

Unlike the other three sections of the report, the study reported on in this section was not undertaken by the City Planning Department, but by the Los Angeles Police Department (LAPD). The basic finding of this portion or the report provides the opinion and "conclusion" that because crime is higher in the Hollywood area than in other portions of Los Angeles, and because Hollywood had a greater concentration of adult businesses than the remainder of the City, that the increased incident's of crime in Hollywood are directly related to the presence of adult entertainment facilities.

The first and most substantial problem with this study is that LAPD freely admitted that they had stepped-up surveillance efforts in Hollywood in 1975 during the period they were compiling the criminal activity counts that were later compared to earlier 1969 figures. No such increase in surveillance efforts was reported for the Hollywood region in 1969 or for the rest of the city in either 1969 or 1975. Further, the LAPD reported a 31% increase in the combined number of patrol officers and criminal investigators assigned to the Hollywood area compared to an increase of only two thirds that size in the remainder of the city.

It is likely that the greater increase in certain types of criminal activity between 1969 and 1975 was found by the police in the Hollywood region when compared to the rest of the city because there was an increase in the number of officers looking harder for crime in Hollywood.

The incomparable increases in the number of officers and the stepped-up intensity of surveillance efforts in the Hollywood region render any findings from this section of the 1977 Los Angeles study unreliable according to any scientific criteria.

E. The second problem with the "special" police study is that it compares the occurrence of criminal activity in the Hollywood area *generally* with the rate of such activity throughout the remainder of Los Angeles. The authors incorrectly infer that because there may be a difference in crime rates between these two geographic regions, that this proves that adult businesses were the cause of the difference. This inference is a logical error known as the "Ecological Fallacy."

The City's interpretation of the results from the "special" police study falls prey to a common logical error in reasoning about research findings known as the "Ecological Fallacy." The fallacy is to assume that something learned about a unit in general says something about the individuals making up that unit.

For example, consider a finding that voting precincts (the ecological unit) with larger percentages of women (individuals) voted, on average, for the Republican candidate in an election. Although we may be tempted to do so, we cannot conclude that women in the precinct were more likely than men to have voted for the Republican candidate, since we have only information collected at the level of precinct, not at the level of the individual voter. Perhaps, the women's vote was more or less "split" while the men in each precinct voted overwhelming for the Republican candidate.

Similarly, we cannot assume that a higher crime rate in Hollywood is due to adult businesses unless we collect information that links crime to the adult businesses *per se* rather than only measuring crime in Hollywood generally and then comparing it to the rest of LA.

The City of Los Angeles commits the Ecological Fallacy in its 1977 Study when, upon finding a difference between the crime rates in the Hollywood area and the rest of the city, it assumes -- *out of an almost infinite list of variables* -- that this difference is due specifically to the concentration of adult businesses in Hollywood, when the researchers did not measure the actual impact of such businesses in Hollywood at all. Simply comparing the crime rates in the entire Hollywood area

(regardless of whether such crime occurred on or near an adult business property) with the remainder of the city as a whole is an invalid method of attempting to determine whether the increase of crime in the Hollywood area is somehow associated with adult establishments.

F. Summary and implications.

We have illustrated above that not only are there significant methodological flaws in the manner in which the four portions of the 1977 Los Angeles Study were conducted, but that, more importantly, there are no true findings contained in that report which could allow any reasonable social scientist to conclude that adult entertainment facilities were somehow connected to increase in crime and decreases in surrounding property values. More importantly, there are no findings in that Study, direct, indirect, or even implied, justifying the necessity for precluding "multiple use" establishments or providing any support whatsoever for the proposition that such a regulation would serve to reduce or ameliorate such secondary effects.

IV. There Are Studies That Pass the Threshold Questions: (1) "Compared to What?" (2) "Is This Just a One-time Fluke?" (3) "Is Crime Measured According to a Reliable Source?" and "Did the Government Go About Looking for More Crime to Justify its Legislation?" (4) "Did the Investigators Talk Only to People Who Would Give Them the Answers They Wanted to Hear?" These Studies Have Found No Evidence of Adverse Secondary Effects for Adult Businesses and Exotic Dance Establishments.

After having analyzed the prior secondary effects studies, and in particular the 1977 Los Angeles Study,

and having made certain statements concerning the proper methodology that should be utilized in any such investigation in order to be confident that there is even a modicum of trustworthiness in the results obtained, we now undertake an analysis of more recently conducted evaluations of the supposed nexus between adult business establishments and perceived adverse secondary effects. Unlike the LA 1977 Study, the studies described below have attempted to adhere to appropriate methodological concerns so as not to violate the fundamental scientific, methodological and common sense principles discussed above.[7]

These studies, some of which were conducted at the behest of adult business owners but others which were commissioned by the applicable governmental unit, fail to establish any relationship between the operation of adult entertainment businesses (at least those in the form of establishments that present live nude, "topless" or "pasties and g-string" dance entertainment) and negative secondary effects; they offer the highest degree of evidentiary reliability of any preexisting secondary effects studies to date; and they certainly lend evidentiary credence to the underlying proposition of this paper--that being that courts should not accept the mere recitation of a supposed "secondary effects study," without specific analysis thereof, in order to justify regulation and in some instances prohibition of speech and expression related activities.

Overwhelmingly, these studies demonstrate that when proper methodology is employed, and the threshold questions transcended, there are no

[7] Pursuant to instructions of the Clerk of this Court, copies of the materials referenced in this section of this paper have been lodged with the Court.

demonstrable adverse secondary effects of adult entertainment establishments in the form of crime, reduction of property values, and urban blight.

A. The Fulton County Studies.

These studies are reported in *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001). On June 13, 1997, the Fulton County Police Department completed a study concerning the number of calls for police assistance and the number of types of crimes occurring in the vicinity of twelve drinking establishments; six that featured adult entertainment and six that did not. This study meets the methodological criteria that we discuss in this paper. The study concluded that, for the time period January 1, 1995 through May 31, 1997, there was *no statistical correlation* of an increase in crime at adult entertainment establishments that served alcoholic beverages. Rather, the statistics indicated *greater* instances and calls for service and reported crime at *non*-adult entertainment establishments that served alcoholic beverages.

The methodological features of this investigation conform closely with several of the scientific principles and common sense rules we apply here to determine if a finding can be trusted. First, crime was measured according to a reliable source--the number of calls for police assistance recorded by computer and compiled by the police objectively, on a daily basis. Second, there was no "stepped up police surveillance" that could inflate crime measurements. A comparison was made between crime rates surrounding the adult establishments and crime surrounding comparable business establishments—answering the "compared to

what" question. And, finally, a sufficient time period, 30 months of calls for service, was utilized to avoid capitalizing on a "one-time fluke" in criminal activity.

In addition, an economic impact study was conducted in 1997. Six Fulton County adult entertainment establishments commissioned Land Development Analysts, Inc. to conduct a study of the clubs' economic impact on their surrounding environs. This study sought to identify negative impacts, if any, on the business volumes, rental rates and property values of surrounding properties. The study revealed high occupancies and rental rates in existing buildings, expensive improvements, business expansions, turn-away business volumes and proposed development in the vicinity of the studied adult clubs. The investigation found no detrimental impacts as caused by the adult facilities.

In response, the County Board of Commissioners had the study peer-reviewed. The Board retained its own appraiser to inspect the subject properties and to review the economic impact study. The appraiser hired by the Board certified that the clubs had gathered the appropriate data and drew appropriate conclusions.

B. Charlotte/Mecklenburg County North Carolina Studies.

Two studies, a property value appreciation study and a crime study, were undertaken in 2001 in the Charlotte/Mecklenburg County, North Carolina, area. As with the Fulton County studies, these investigations utilize the scientific principles and common sense rules outlined above.

The Property Values Study (*See*, "Measuring secondary effects using spatio-temporal estimation of real estate price appreciation," George W. McCarthy and Henry Renski, University of North Carolina at Chapel Hill, 5/24/01) made use of the entire tax appraisal database for Mecklenburg County, which lists all properties and the last two sales prices of the properties (approximately 600,000 properties). The authors only used houses that were sold twice between 1980 and 1999 (approx. 65,000 properties). Methods were used to determine how far the properties were from the 20 adult dance clubs in the county. The authors then compared annual real estate appreciation rates near clubs versus not near clubs in Mecklenburg County.

The findings indicated that examining performance over time, housing near adult establishments appreciated at least as fast or faster in 11 of twenty years.

Using 1980-2000 tax assessment data from Mecklenburg County, North Carolina, the authors estimated annual appreciation rates and evaluated the extent to which appreciation rates are related to the location of adult clubs. The study showed that there was no evidence that negative secondary effects on house price appreciation can be found in two decades of housing transactions in Mecklenburg County. In fact, the authors note that their interpretation may be too conservative:

> "The results of the study are consistent with the empirical results of the oft-cited studies of negative secondary effects discussed above. In almost every study discussed, the secondary effects

associated with adult establishments are inconclusive. However, this is a rather conservative reading of the results. One might make the argument that there is evidence from the other studies, evidence that is validated in this study, that there are *positive* secondary effects associated with proximity to adult establishments. While the existence of positive secondary effects might seem an absurd claim, an argument might be made that the location of adult establishments is non-random.

The non-randomness might be associated with the same non-randomness that leads to the location of other undesirable activities (for example, junkyards, mobile home parks, other noisy or dirty production activities) to areas with inexpensive properties. Low priced properties might provide higher than average returns, especially as urban sprawl or development limits make the areas more desirable development locations" (pg. 20).

The Charlotte Crime Study (*see*, "Are Adult Dance Clubs Associated with Increases in Crime in Surrounding Areas? A Secondary Crime Effects Study in Charlotte, North Carolina," May 18, 2001, Kenneth C. Land, Jay R. Williams, and Michael E. Ezell, Duke University) tested the hypothesis that the presence of an adult nightclub increases the number of crime incidents reported in localized areas.

Appropriate methodology was utilized to select suitable control (non-adult nightclub) sites that were comparable (matched) to the study (adult nightclub) sites on key demographic and other variables that are generally regarded as being related to the incidence of crime.

With support from the United States Department of Justice Office of Community Oriented Policing Services, the Charlotte-Mecklenburg Police Department maintains a computerized reported incidents information system for the city of Charlotte and Mecklenburg County, North Carolina, that permits the easy collection of data concerning all crime incidents reported at or near each of the adult nightclubs and control sites for the three years 1998 through 2000. This information served as the basis of the report.

The authors grouped the reported crime incidents into six categories, ordered from the most to the least inclusive as follows: Total crimes; total Uniform Crime Reports Index Crimes; total Uniform Crime Reports Violent Crime Index Crimes (murder, rape, aggravated assault, robbery); total Uniform Crime Reports Property Crime Index Crimes (burglary, larceny-theft, motor vehicle theft, arson); sex crimes; and all other crimes.

The results revealed that with respect to *all six categories* of crime incidents under investigation, the overall mean numbers of crime incidents for all three years combined are *substantially less* in the areas surrounding the adult nightclubs than in the areas surrounding the control (non-adult) sites.

C. The Fort Wayne Study.

An empirical study of criminal activity surrounding exotic dance nightclubs in Fort Wayne, Indiana, was undertaken in 2000 by the authors.[8]

As with the Charlotte/Mecklenburg and the Fulton County studies, this examination of the supposed adverse effects of so- called "adult" establishments also adheres to the requirements set out by this Court in *Daubert* for the proper conduct of a social scientific inquiry.

A 1000 feet circumference surrounding each of eight exotic dance nightclubs in Fort Wayne was established. Comparison areas were selected in the city and matched to the club areas on the basis of demographic features known to be related to crime and also matched on the basis of commercial property composition.

Information on calls to the police for service (many of which ended in arrest) for the three-year period of 1997-2000, was obtained. Only crimes presumed to be related to exotic dance establishments were included in our examination. These included: 1) Sex crimes (rape, molestation, indecent exposure, sexual battery); 2) aggression related non-sexual

[8] The Ft. Wayne clubs studied do not operate in a form of what is traditionally considered to be an "adult" entertainment business. The entertainers at these establishments perform wearing "pasties" and "g-strings" consistent with Indiana statute and this Court's decision in Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). For this reason, while we refer to previous reports and studies as attempting to analyze the relationship of "adverse secondary effects" and "adult" businesses, we generally refer to the studied facilities here either as "nightclubs" or "exotic dance" establishments.

offenses (shootings, fights, non-sexual battery, disturbances); and 3) thefts, burglaries and robberies.

The number of calls to the police and arrests in the areas surrounding the exotic dance nightclubs was then compared to the number of crimes found in the matched comparison areas. The analysis showed little difference, overall, between the total number of calls to the police reported in the areas containing the exotic dance nightclubs and the total number of offenses reported in the comparison areas. For sex crimes (presumed to be especially likely to be related to exotic dance entertainment establishments) such as rape, molestation, indecent exposure and sexual battery, the overall number of crimes was nearly identical in the areas surrounding the exotic dance nightclubs and the comparison areas. The same pattern of similar crime levels in the club and comparison areas held for thefts, burglaries and robberies. However, for aggression-related, nonsexual offenses, the club areas actually had *only one half* as many calls for service as the comparison areas.

We concluded that there was no empirical evidence of the existence of adverse secondary effects, in the form of crime, surrounding exotic dance businesses in Fort Wayne. Any assumption that such effects existed and that this city should regulate such establishments on the basis of such "adverse secondary effects" was therefore, we contended, not substantiated by that study.

In summary, the findings from the Fulton County, Charlotte/Mecklenburg and Fort Wayne investigations, unlike most of the previously cited secondary effects studies (including the Los Angeles 1977 Study) are

empirically reliable because they apply scientific and common sense principles. Our analyses of these studies suggest that when proper methodology is employed, there are few if any adverse secondary effects found as being associated with adult establishments. In fact, these studies suggest, as did the governmentally prepared St. Paul, Minnesota (1978) study (discussed in detail in *Paul, et al.*, at 375, as being the only methodologically sound investigation among the ten most frequently cited studies), that there is more crime and neighborhood deterioration in other areas of the community, especially where alcohol is served in a non-adult entertainment setting -- than in the areas immediately surrounding adult nightclubs.

Now, in light of these observations, we address the immediate question before the Court.

V. Even if the Los Angles 1977 Study Had Found Evidence of Adverse Secondary Effects Generally, Such findings Would Not Provide Any Information as to Whether "Combination" Uses Engender Particularized Problems That Would be Specifically Addressed by a General "Dispersal" Zoning Ordinance. The Question of When Study Findings can be Generalized to Another Time, a Different Place, or Other People is ultimately an Empirical One.

The fundamental question under consideration by this Court is: Assuming that the 1977 LA Study *had* established evidence of the existence of secondary effects associated with the concentration of adult businesses, can that information be utilized to justify a law prohibiting the establishment of "adult" "combined" or "mixed" uses?

We conclude, as the Ninth Circuit did, that such an extension is unwarranted and that these limited "findings" provide no basis or justification –whether empirical, intuitive or otherwise –for the zoning provisions under review. In scientific terms, the Circuit Court was grappling with the question of when it is appropriate to "generalize" the findings of an empirical investigation to circumstances other than those originally studied.

A. When is it unreasonable to generalize study findings from one situation to another?

In science, "generalizability" is defined as the quality of a research finding which justifies the inference that it represents something more than the specific observations upon which it is based.

As the present case illustrates, generalizing a research finding beyond the specific observations on which it is based can include multiple considerations. Sometimes it is a matter of seeking similarities between the "character' of the original units studied and the new units to which we wish to generalize. Other times, it may be a matter of frequency of presentation of, for example, adult material as in equating the single showing of a film with the harmful effects assumed to occur with businesses devoted to adult fare. *See, e.g., Tollis v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987).

More broadly, sometimes generalizability it is a matter of similarity of concepts: If you discover why people commit burglaries, can you generalize that discovery to other crimes as well?[9] Often, it involves the

[9] Earl Babbie, supra, at 215 n.8.

generalization of findings from a sample to a population. We cannot generalize our findings to other populations because we did not take a random sample from the population (we sampled males and we wish to generalize to females, or we sampled older people and we wish to generalize to younger people in the population).

Other times, we cannot generalize because of the methods we empl y to study a phenomenon. If we have measured a phenomenon at a certain level, or chosen a certain "unit of analysis," our findings may not apply well to other units we may wish to consider. Here, our example of the Ecological Fallacy from the "special police study" of the 1977 Los Angeles Study above applies. It is logically impossible to conclude anyth ing about the impact of the concentration of adult businesses in Hollywood when measurements of crime have been taken only at the level of the entire community.

B. Whether the results of a study can be generalized to other times, locations, situations or other persons is an empirical question.

As can be seen from these examples, there is no "magic formula" for determining when a study is generalizable. Instead, social scientists, when confronted with important social policy questions, have come to rely on additional empirical investigations when in doubt about a study's general applicability. An additional investigation is often the only way to insure against improperly extrapolating findings. Thus, whether or not one is able to generalize across people, places, or methodologies may ultimately be an empirical question. Sometimes, only an additional study can tell us how far

a specific set of observations, made earlier, may be extended.

C. Los Angeles should have first empirically determined if it's original zoning legislation was effective before implementing another, more restrictive, set of regulations.

The evidence Los Angeles has relied upon here -- the 1977 Study -- contained no empirical evidence that addresses the specific question of whether an individual combination bookstore/arcade produces any of the increased crime the original study (allegedly) found resulting from a concentration of adult businesses. Nor was any analysis undertaken of the effect upon supposed adverse secondary effects by the enactment of the original "dispersal" zoning provisions which were themselves predicated upon the findings of the 1977 Los Angeles Study itself.

If we assume that the dispersal requirement was meant to ameliorate supposed secondary effects associated with adult businesses, we must also then logically assume that following the enactment of those provisions (which clearly pre-dated the "multiple use" regulations at issue here), whatever secondary effects may have existed would have been significantly reduced or abrogated altogether.

The question then remains, and it is clearly an empirical one, of what secondary effects, if any, exist *after* the enactment of a specific regulation meant to address those problems. If we do not ask that question, we invite the never-ending enactment of yet more and more (and ever more onerous) restrictions without ever examining whether there are any problems left to be

addressed following the enactment of a law meant to correct such problems.

Here, mere reference to the 1977 Los Angeles Study tells us nothing objectively about what secondary effects may remain once the dispersal regulations were enacted in an effort to address those problems. In addition, in the absence of *any* empirical evidence – old, new or otherwise -- of the adverse effects associated with these combination adult uses, it is unreasonable, we contend, for any court to permit a governmental unit to infer or conclude that absent additional regulations, a bookstore/arcade combination would have harmful secondary effects.

Here, Ninth Circuit was faced with the question of whether the government may restrict to selected locations, mixed uses adult businesses on the sole basis of the results of the 1977 Los Angeles Study. In our opinion, that court was correct in asserting that it was not reasonable to rely on that study as justification for these restrictions, first, because that study does not objectively demonstrate any clear adverse effects and, second, even if such effects were reliably shown, it is not readily apparent that they may be generalized to the new question about mixed use businesses *after* the enactment of a general dispersal ordinance.

VI. The Policy Implications for the Secondary Effects Doctrine.

As we have shown above, legislative bodies and courts are now confronted with methodologically sound studies that fail to demonstrate a connection between the existence of adult businesses and negative secondary effects. They are also faced with the

submission of the older-type studies, many "conducted" between twenty to thirty years ago which in some circumstances were not "studies" at all, in other circumstances demonstrated either no connection between adult uses and secondary effects or even an *inverse* connection, in many cases dealt with types of businesses that no longer even exist (adult movie theaters), in virtually all circumstances were undertaken *before* the enactment of specific regulations meant to alleviate those perceived problems, and which by-and-large were not undertaken utilizing even the most rudimentary methodological constraints in an effort to insure validity of the results.

Given the state of contradicting empirical evidence that will be faced by legislative bodies and courts in the future, guidelines may be welcomed to establish under what circumstances the assertion of secondary effects may be utilized as a justification for regulations upon speech and expression related activities. We assert that two sets of inquiries (A and B below) should be made when examining purported evidence that is submitted in an effort to justify or challenge the enactment of such a regulation.

A. Any particular study of secondary effects should be examined in order to determine whether it answers the following questions or violate the following principles: (1) "Compared to what?" (2) "Is this just a one-time fluke?" (3) "Is crime measured according to a reliable source?" and "did the government go about looking for more crime to justify its legislation?" and (4) "Did the investigators talk only to people who would give them the answers they wanted to hear?"

While a local legislative body may not be held to these standards, certainly a court may find it useful to ask these questions in order to determine whether purported supporting evidence for a legislative enactment could be reasonably relied upon. In evaluating the vitality, and indeed validity, or purported "evidence," courts may best be served by turning to the standards we have laid out. Such an analysis would allow courts to separate "the wheat from the chaff," and the truth from the "junk science."

B. If there is a question as to whether a study is being applied more broadly than originally intended, or is being utilized to justify successive laws following enactment of regulations meant to address perceived problems noted in the study itself, a new empirical investigation is often warranted.

It should be axiomatic that the fundamental obligation of a court should be to seek the truth. Here, and in future cases, the question must be asked as to whether, at a certain point of time and in a certain set of circumstances (particularly, in light of already-existing regulations), there exists such evidence that can be *reasonably* relied upon establishing that certain types of adult uses engender some forms of secondary effects so as to warrant the enactment of additional laws?

Justice Souter stated in *Pap's* that cities interested in regulating adult activities on the basis of secondary effects should be required to provide germane evidence of a relationship between the expressive activity and secondary effects. 120 S. Ct. 1382 at 1403-04 (Souter, J., concurring in part and dissenting in part). This case and -- in light of the evidence that we have discussed -- cases that will be adjudicated in the

future where the courts will be required pursuant to *Pap's* to evaluate both the "old" and these "new" studies in the secondary effects calculus in order to determine the validity of a particular regulation, well illustrate why this burden should be demanded.

As we have stated, whether findings from a study conducted for one purpose can be applied to another situation is often an empirical question. Common problems occur with generalization to circumstances, people, situations, and time periods other than those originally studied. Unless the question of whether particular findings are empirically relevant to new situations is addressed through scientifically valid empirical research, the secondary effects doctrine will be viewed as a theory not grounded upon an inquiry of truth, but merely as a theoretical (and unsubstantiated) basis to regulate and in some circumstances ban what some may consider to be undesirable expression.

To not undertake additional empirical inquiry is to make it permissible for governments to continue to regulate today on the basis of a study conducted 25 years ago, and undertaken prior to the enactment of other regulations meant to address the perceived problems of secondary effects. In addition, given the nature of some of these previous studies, reliance upon them makes it permissible to regulate on the basis of the opinions of, for example, a group of vocal real estate board members, sampled improperly, whose opinions cannot be extrapolated or generalized to an entire community. Without additional or new empirical investigations, properly conducted, there is nothing to prevent government from using *any* supposed finding from *any* "study" to justify *any* regulation, no matter how

broadly or unreasonably the findings may be extrapolated.

Collection of empirical information is now not overly difficult or expensive. The Fulton County police collected their evidence easily. Such evidence is now at most municipalities' fingertips in the form of calls for service to the police that are routinely computerized and logged. Property value data is in most circumstances easily obtained from real estate databases designed to track these sales for tax purposes. Certainly, there should be nothing feared in regard to investigation as to the true effects that certain adult businesses may have upon specific municipalities, particularly in light of previous (and now long-standing) regulations -- such as zoning dispersal requirements and anti-nudity provisions -- that were enacted with the specific intent to ameliorate such secondary effects.

In *Pap's*, Justice O'Connor and the plurality provided room for challenges, based on the collection of empirical evidence, to assertions made by municipalities regarding a relationship between adverse secondary effects and adult establishments. The plurality noted that the adult business in question in *Pap's* could have challenged the City of Erie's assertion that nudity led to ill effects but did not do so. This leaves room for the introduction of additional secondary effects evidence both in city council hearings and as a basis for court litigation. When courts are faced with these conflicting assertions of secondary effects, they should utilize the tools that we have suggested herein in order to be able to determine truth and reject fiction and innuendo.

Dr. Daniel Linz, Ph.D.
Bryant Paul, MS

JEFFERSONVILLE, INDIANA

Ordinance 95-OR-35
An Ordinance Establishing Regulations for the Operation of Live Adult Entertainment Businesses

[EXCERPTS]

Whereas, the policy of the State of Indiana is to grant Cities and Towns all the powers that they need for the effective operation of local government as to local affairs. Indiana Code 36-1-3-2;

Whereas, the law of the State of Indiana provides that Cities and Towns have all powers granted it by statute, all other powers necessary or desirable in the conduct of its affairs, even if not granted by statute;

Whereas, the City of Jeffersonville has the power to protect the public health, lives and property of its citizens;

Whereas, in order to protect the public health, lives and property of its citizens, the City of Jeffersonville has the authority to impose licensing fees which are reasonably related to the administrative cost of issuance of the license, inspecting and regulating the operation of live Adult Entertainment Businesses;

Wherefore, in order to regulate the operation of those businesses described herein, it is necessary to assess licensing fees upon both the businesses and the entertainers.

* * *

F. Live Adult Entertainment: "Live Adult Entertainment" means:

(1) any live performance which the average person, applying contemporary community standards, finds that the dominant theme of the performance, take as a whole, appeals to the basic interest in sex.

(2) any live performance wherein the matter of the performance depicts or describes, in a patently offensive way, sexual conduct.

(3) any live performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(4) any live performance wherein the participant appears in a state of "nudity."

(5) any business wherein its employees, sub-contractors, independent contractors, or any individual who performs any service upon the premises who receives a salary, wages, tips, gratuities or other remuneration either from the patrons of the business or from the owner, operator, his assigns, partners, employees or other agent, wherein said employee, sub-contractor, or individual performs said service in a state of "nudity."

G. Live Adult Entertainment Business: "Live Adult Entertainment Business" means any business within

the City of Jeffersonville wherein those activities as defined in section "F" above are conducted for profit.

H. Adult Entertainer: "Adult Entertainer" is any individual who engages in conduct as defined in section "F" above who receives a salary, wages, tips, gratuities or other remuneration either from patrons of a business or from the owner operator his assigns, partners, employees or agents for services performances as defined in section "F."

* * *

II. Licensing of Adult Entertainment Businesses

Owner's Licensing: Any person who owns a building or structure which is to be utilized as a place for live adult entertainment shall apply in writing to the office of the Jeffersonville Building Commissioner, upon a form to be furnished by the Jeffersonville Building Commissioner. That the form shall require the following information as well as any and all other information deemed appropriate by the "Adult Entertainment Commission" (hereinafter AEC):

A. The name, address, telephone number, social security number and date of birth of the owner. If the owner is a corporation, partnership or other business entity the applicant must provide the above information for all of those principals in said business entity.

B. If the owner is a corporation the applicant must provide a copy of the corporation's articles of incorporation. Moreover, the

applicant must provide proof that the corporation has no outstanding corporate taxes, both Federal and State, outstanding.

C. The applicant must provide proof that all property taxes upon the structure or building are current and provide certified acknowledgment that no liens have been placed against said building or structure for municipal services such as sewage, water and/or other services provided.

D. The names, address and telephone numbers of any and all other live adult entertainment businesses which the owner is a partner, employee, stock-holder, sole proprietor or has any affiliation or association as either an owner or operator.

F. The applicant must provide written statements from not less than three (3) bona fide residents of the City of Jeffersonville setting forth the applicant is of good moral character.

2. Owner's Licensing Fee: That the completed application shall be accompanied by a certified check made payable to the City of Jeffersonville in the amount of Ten Thousand Dollars ($10,000). The check shall be placed in escrow pending determination of the applicant's fitness for licensure.

A) If it is determined by the AEC that the Owner is suitable for licensure, the full amount of Ten Thousand Dollars ($10,000) shall be transferred to the City's general fund;

B) If the AEC denies the owner's application the City shall return Five Thousand Dollars ($5,000) of the fee to the owner. The remaining Five Thousand Dollars (5,000) shall be transferred to the City's general fund for the purpose of off-setting administrative and regulatory costs;

C) The Owner's license shall be displayed at all times in a public place visible. The failure to display this license in a public place shall result in a Two Thousand Five Hundred Dollar ($2,500) fine.

3. Operator's License: Any person who shall serve as the operator of a place for live adult entertainment shall apply in writing to the office of the Jeffersonville Building Commissioner, upon a form to be furnished by the Jeffersonville Building Commissioner. The form shall require the following information as well as any and all other information deemed appropriate by the AEC:

A) The name, address, telephone number, social security number and date of birth of the operator.

B) The operator's pervious address for the ten (10) years prior to the filing of the application.

C) A full criminal history or the applicant including, but not limited to misdemeanor and juvenile offenses.

D) The operator's previous employer's for the ten (10) years prior to the filing of the application.

E) The applicant must also execute a waiver and release permitting the AEC and its investigator to secure information from the applicant's previous employer's.

F) The applicant's mental health history for the ten (10) years prior to the filing of the application.

G) The names, address and telephone numbers of any and all other live adult entertainment businesses which the operator is a partner, employee, stock-holder, sole proprietor or has any affiliation or association as either an owner or operator.

H) The applicant must also execute a waiver and release permitting the AEC and its investigator to secure information from the applicant's previous employer's, the Indiana State Welfare Department, the Kentucky State Welfare Department and the United States Justice Department. Moreover, the applicant appear at the Jeffersonville Police Department for finger printing.

I) The applicant must also present three (3) forms of photographic identification. If it is

determined by the AEC that these forms of identification are insufficient the applicant request shall be denied.

J) The applicant must provide written statements from not less than three (3) bona fide residents of the City of Jeffersonville setting forth that the applicant is of good moral character.

* * *

6. Operator's Employment Limitation: No one shall be granted a license to operate an adult entertainment business in the City of Jeffersonville if that individual is employed in any capacity by any other adult entertainment business. This prohibition includes employment at an adult entertainment business in any City, County, or State within the United State of America, Canada or South America.

A) If any operator receives a license from the City of Jeffersonville and it is later determined that the operator is employed by any other adult entertainment business said operator's license shall be immediately revoked and said operator shall be fined Two Thousand Five Hundred Dollars ($2,500).

B) Moreover, the owner of the adult entertainment business wherein the operator was employed shall immediately have his owner's license suspended for a period of not less than ninety days (90) nor more than one

hundred eighty days (180) and shall be fined Two Thousand Five Hundred Dollars ($2,500).

C) That the owner shall have burden of notifying the AEC its agent and/or designee when an operator is no longer employed by the owner. The owner shall be prohibited from asserting the defense of "lack of knowledge" of the operator's additional employment.

D) Burden upon Owner: The owner shall have the burden of knowing that employment history of his operator's. The owner shall be presumed to have knowledge of whether or not an operator is employed by another adult entertainment business while serving as a licensed operator on behalf of the owner.

7. Entertainer License: Any person who shall serve as an entertainer as a place for live adult entertainment shall apply in writing to the office of the Jeffersonville Building Commissioner, upon a form to be furnished by the Jeffersonville Building Commissioner. The form shall require the following information as well as any and all other information deemed appropriate by the AEC:

A. The name, address, telephone number, social security number and date of birth of the entertainer.

B. The entertainer's previous address for the ten (10) years prior to the filing of the application.

C. A full criminal history of the applicant including, but not limited to misdemeanor and juvenile offenses.

D. The entertainer's previous employer's for the ten (10) years prior to the filing of the application.

E. The applicant must also execute a waiver and release permitting the AEC and its investigator to secure information from the applicant's pervious employer's, the Indiana State Welfare Department, the Kentucky State Welfare Department and the United States Justice Department. Moreover, the applicant appear at the Jeffersonville Police Department for finger printing.

F. The applicant's mental health history for the ten (10) years prior to the filing of the application.

G. The names, address and telephone numbers of any and all other live adult entertainment businesses which the applicant is a partner, employee, entertainer stock-holder, sole proprietor or has any affiliation or association as either an owner or operator.

H. The applicant must also present three (3) forms of photographic identification. If it is determined by the AEC that these forms of identification are insufficient the applicant request shall be denied.

I. The applicant must provide written statements from not less than three (3) bona fide residents of the City of Jeffersonville setting forth that the applicant is of good moral character.

J. A certificate from a medical doctor designating that the applicant has, within the 30 days immediately prior thereto, been examined and found to be free of any contagious or communicable disease. Including, but not limited to venereal disease, H.I.V., Hepatitis or other such diseases.

* * *

10. Entertainer's Employment Limitation: No one shall be granted a license to entertain at an adult entertainment business in the City of Jeffersonville if that individual is employed in any capacity by any other adult entertainment business. This prohibition includes employment at an adult entertainment business in any City, County, or State within the United States of America, Canada or South America.

NEIGHBORHOOD DETERIORATION
and the
LOCATION OF ADULT ENTERTAINMENT ESTABLISHMENTS
in
ST. PAUL

Prepared by the

COMMUNITY CRIME PREVENTION PROJECT
of the
Minnesota Crime Control Planning Board
and the
Division of Planning
DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT
of the
City of St. Paul

April, 1978

In May of 1977, the Community Crime Prevention project of the Minnesota Crime Control Planning Board released a study which indicated a strong clustering of crimes around on-sale liquor establishments in Minneapolis. Subsequent to the issuing of this report, the city of St. Paul, through the city council and the mayor's office, became concerned about the impact which adult entertainment had on the neighborhoods in which they were located. These mutual interests and experiences of the city of St. Paul and the Community Crime Prevention project combined to produce this report.

NEIGHBORHOOD DETERIORATION and the LOCATION OF ADULT ENTERTAINMENT ESTABLISHMENTS

INTRODUCTION

Bars, X-rated theaters, bookstores, specializing in pornography, massage parlors and other adult entertainment businesses are generally thought to deteriorate the neighborhoods in which they are sited. These establishments are believed, for instance, to attract unsavory outsiders, set bad examples for minors or otherwise lessen the desirability of the affected neighborhoods as places to live.

Despite this widespread concern about the impact of various adult entertainment facilities, little research has been conducted on the effect of these establishments on the neighborhoods in which they are located. A study of the effects of sexually oriented businesses in California found that areas with high concentrations of these establishments generally showed a relative decrease in property values when compared to areas without such establishments.

However, the study determined that these concentrations of sex-oriented businesses *were not the primary cause* of the lowered property values.[1] A study in Minneapolis of the spatial distribution of crimes around facilities with on-sale liquor licenses showed a distinct pattern of clustering of crimes within one-tenth of a mile of these establishments.[2] However, no studies have been conducted of the overall effect which all adult entertainment establishments (both alcohol-serving and sexually oriented) have on their surrounding neighborhoods. The following study was designed to investigate the effects of a variety of adult entertainment facilities in St. Paul upon the character of the neighborhoods in which they are located.

* * *

ADULT ENTERTAINMENT ESTABLISHMENTS, 1970-1976

A list of all adult entertainment establishments existing in St. Paul during the study period of 1970-1976 was complied by the St. Paul Planning Division. Establishments were classified as either alcohol-serving businesses or as sexual businesses, which included adult bookstores, adult theaters, and saunas. Alcohol-serving establishments were further classified as to whether they had a tavern (live entertainment) license and, if so, whether such entertainment was sexual in nature. This information was verified, with the aid of the city licensing division's records and the city policy

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[1] *Study of Effects on the Concentration of Adult Entertainment Establishments in the City of Los Angeles*, (Los Angeles: City Planning Department) June 1977.

[2] *Crime in Minneapolis: Proposals for Prevention*, (St. Paul, Minn.: Governor's Commission on Crime Prevention and Control, May, 1977).

department, for the initial and final study time-points, 1970 and 1976.[1]

This classification system results in the following adult entertainment establishment types:

I. Alcohol-serving establishments.
   - A. Alcohol-serving, without live entertainment
   - B. Alcohol-serving, with live entertainment
     1. Nonsexual entertainment
     2. Sexually oriented entertainment

II. Sexually oriented establishments
   - A. Sexual only (adult bookstores, theaters, and saunas)
   - B. Alcohol-serving, with sexually oriented entertainment (same establishments as in B-2 above)

* * *

The number of all adult entertainment establishments (all alcohol-serving and sexually oriented establishments combined) present in neighborhoods in 1970 is significantly related to the neighborhood quality.[1]

[1] Although the possession of a license for live entertainment was verified for each establishment, it could not be ascertained from the records whether all of these establishments classified as having sexually oriented live entertainment were those known by the city police department to offer exclusively sex-oriented entertainment. Establishments which had lingerie or swim wear luncheon shows, etc., for only brief periods of the study time were not classified as sexually oriented.

[1] Throughout this study, the presence or absence of a relationship is determined by statistical significance. That is, the statement "a relationship was found . . ." indicates that the analysis results were significant at the $p \leq .05$ level; the statement "no relationship was

That is, neighborhoods with higher crime rates and lower median housing values in 1970 tend to have more adult entertainment facilities located in them. Specifically, neighborhood quality in 1970 is related to the number of alcohol-serving establishments. When types of alcohol establishments are studied, neighborhood quality shows a relationship to the presence of establishments without live entertainment licenses, but has only a (statistically) marginal relationship to establishments with live entertainment licenses. No relationship is found between neighborhood deterioration and the number of sexually oriented establishments present in 1970.

A similar pattern of association appears in the 1976 analyses. The number of all adult entertainment establishments (alcohol-serving and sexually oriented combined) in 1976 is significantly related to neighborhood quality. As in 1970, this relationship is seen for the number of alcohol-serving establishments. This relationship between neighborhood quality and liquor-serving establishments in 1976 is present for both entertainment – and nonentertainment – licensed facilities (although the relationship is stronger for the establishments without entertainment licenses). Again, as in 1970, no relationship is found between neighborhood deterioration and the presence of sexually oriented establishments.

In summary, as shown in Table 1, the present of all adult entertainment establishments (alcohol-serving and sexually oriented combined) tends to be associated with greater neighborhood deterioration in both 1970 and 1976. *However, when types of adult entertainment establishments are studied separately, this relationship is*

found . . ." indicates that the analysis results were *not* significant at the $p \leq .05$ level.

found only for the alcohol-serving establishments, not for sexually oriented facilities.

* * *

These analyses show the same overall pattern of results as found in Stage I. For both 1970 and 1976, the presence of all adult entertainment establishments (alcohol-serving and sexually oriented combined) is related to neighborhood deterioration. As in Stage I, when adult entertainment establishment types are analyzed separately, the relationship is found only for alcohol-serving establishments. Neighborhood quality/deterioration is significantly related to the total presence of alcohol-serving establishments, and to the presence of establishments without live entertainment licenses. The relationship found between deterioration and entertainment-licensed establishments in Stage I does not persist after zoning and neighborhood age are controlled. As in Stage I, there is no relationship, in either 1970 or 1976, between neighborhood deterioration and the presence of sexually oriented establishments.

In summary, as shown in Table 2, a relationship between neighborhood quality and the number of all adult entertainment establishments (alcohol-serving and sexually oriented combined) located in the neighborhood does persist after introducing controls. This relationship is found for the alcohol-serving adult entertainment facilities studied but not for the sexually oriented establishments. These same patterns of association are present for both 1970 and 1976. *Therefore, the relationship between neighborhood deterioration and the presence of all adult entertainment establishments is more accurately viewed as a relationship between neighborhood deterioration and the presence of all alcohol-serving establishments.*

* * *

TABLE 2
SUMMARY OF STAGE II:
Relationships between Adult Entertainment Establishments and Neighborhood Quality/Deterioration Controlled for Legal/Market Influences[a]

Type of Adult Entertainment Establishment	1970 Deterioration and 1970 Establishments	1976 Deterioration and 1976 Establishments
All Establishments: (alcohol serving and sexually oriented combined)	Related	Related
ALCOHOL-SERVING:		
Without entertainment licenses	Related	Related
With entertainment licenses	Not Related	Not Related
Sexually Oriented	Not Related	Not Related

[a]The presence of relationships is statistically significant, $p < .05$.

* * *

In conclusion, as shown in Table 3, adult entertainment facilities tend to be established in areas of relative deterioration. A pattern of deterioration appears to follow the locations of certain types of adult entertainment establishments. This could be an increase in the pattern of deterioration *already present. This cycle of "deterioration-adult entertainment-deterioration" is seen only for areas in which there are alcohol-serving establishments.* Sexually oriented establishments, when analyzed by themselves, do not

show this cyclic pattern of relationship with neighborhood deterioration.

* * *

TABLE 3
SUMMARY OF STAGE III:
Relationships between Adult Entertainment Establishments and Neighborhood Quality/Deterioration Controlled for Legal/Market Influences[a]

Type of Adult Entertainment Establishment	1970 Deterioration and 1970 Establishments	1976 Deterioration and 1976 Establishments
All Establishments: (alcohol serving and sexually oriented combined)	Related	Related
ALCOHOL-SERVING:	Related	Related
Without entertainment licenses	Related	Related
With entertainment licenses	Not Related	Not Related
Sexually Oriented	Not Related	Not Related
Although adult entertainment establishments tend to locate in already deteriorated neighborhoods, there is a stronger tendency for deterioration to follow the location of adult entertainment establishments.		

[a]The presence of relationships is statistically significant, $p < .05$.

* * *

E. SUMMARY OF FINDINGS

A summary of the relationships found in Stages I through IV is presented in Table 5.

[Insert Table 5]

STAGE I: *Does deterioration tend to occur in the same areas of the city as adult entertainment businesses are located, in 1970? in 1976?*

The presence of all adult entertainment establishments (alcohol-serving and sexually oriented combined) tends to be associated with greater neighborhood deterioration in both 1970 and 1976. However, when types of adult entertainment establishments are studied separately, this relationship is found only for the alcohol-serving establishments, not for sexually oriented facilities.

STAGE II: *Does the relationship between neighborhood deterioration and adult entertainment persist even when other factors are controlled, in 1970? in 1976?*

A relationship between neighborhood quality and the number of all adult entertainment establishments (alcohol-serving and sexually oriented combined) located in the neighborhood does persist after introducing controls for legal and market influences. This relationship is found for the alcohol-serving adult facilities studied but not for the sexually oriented establishments. These same patterns of association are present for both 1970 and 1976. Therefore, the relationship between neighborhood deterioration and the presence of all adult entertainment facilities is more accurately viewed as a relationship between

neighborhood deterioration and the presence of all alcohol-serving establishments.

STAGE III: *Has deterioration in neighborhoods followed rather than preceded the location of adult entertainment businesses in the affected neighborhoods, during the 1970-1976 time period? That is, do adult entertainment establishments contribute to neighborhood deterioration?*

Adult entertainment facilities tend to be established in areas of relative deterioration. A pattern of deterioration appears to follow the locations of certain types of adult entertainment establishments. This could be an increase in the pattern of deterioration *already present.* This cycle of "deterioration-*adult entertainment*-deterioration" is seen only for areas in which there are alcohol-serving establishments. Sexually oriented establishments do not show this cyclic pattern of relationship with neighborhood deterioration.

STAGE IV: *Is the effect of adult entertainment on neighborhood quality/deterioration a threshold phenomenon? That is, does neighborhood quality show a marked deterioration after a critical number of adult entertainment establishments are located in an area?*

The number of adult entertainment establishments in a neighborhood has a strong threshold effect on associated neighborhood deterioration, for both 1970 and 1976. This means that the increase in deterioration associated with each additional establishment is not constant. The effect of each

additional adult entertainment establishment on neighborhood quality depends upon the number of such establishments already present in the area. The addition of an adult entertainment establishment to an area with more than one or two of these establishments already present is associated with a marked increase in neighborhood deterioration. When types of adult entertainment establishments are studied separately, threshold effects are found for the number of alcohol-serving establishments, not for the number of sexually oriented establishments present.

SUMMARY AND IMPLICATIONS FOR PUBLIC POLICY

These is statistically significant relationship between the number of adult entertainment establishments (alcohol-serving and sexually oriented combined) located in an area and the deterioration of that area as reflected in housing values and crime rates. This relationship was found to exist in both 1970 and 1976, even when legal and market influences such as light industrial/commercial zoning and neighborhood age are controlled for.

When types of adult entertainment establishments were studied separately, a significant relationship was found between neighborhood deterioration and the number of alcohol-serving establishments; in the presence of controls for legal and market influences, the number of alcohol-serving establishments without entertainment licenses was found to be most strongly related to neighborhood deterioration.

It should be noted, while the presence of sexually oriented establishments taken by themselves does not

show a significant association with neighborhood deterioration, these establishments tend to locate in areas which already reflect the effects of other adult entertainment establishments, making it difficult without further analysis to ascertain the unique contribution which sexually oriented establishments have on neighborhood deterioration.

From: **David Bugher**
To: **DHEID**
Subject: **Adult businesses**

Well, I have a depressing statistic. It's good in one way and bad another. Since incorporation, the City has amassed 15,415 reported criminal incidences. Get this, 25% occurred along a 300 acre strip of Pacific Highway and South Tacoma Way. How many incidences were within 1,000 feet of all adult entertainment establishments? 400! A lousy 400! That's only 2.6% of the total! Jack Burns will love this.

What bothers me is that many communities use the secondary effects of adult businesses (i.e. crime) to justify stricter codes. This aspect or element just doesn't seem to be present. Sure, there is a great amount of crime in the area, but it is associated with I-5 and the low income neighborhoods along I-5.

I have tried working this issue from a number of different angles. I have tried to focus on the types of criminal incidences (rape, burglary, vandalism) to see if such a corollary existed. It doesn't. I know this isn't what people want to hear, however, that is what is reported.

Dave

Supreme Court, U.S.
FILED
AUG 17 2001
CLERK

No. 00-799

IN THE

Supreme Court of the United States

THE CITY OF LOS ANGELES,
Petitioner,
v.
ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE DKT LIBERTY PROJECT IN SUPPORT OF RESPONDENTS

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August 17, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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No. 00-799

IN THE

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THE CITY OF LOS ANGELES,

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v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF *AMICUS CURIAE*[1]

The DKT Liberty Project was founded in 1997 to defend individual liberties against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties that threaten the reservation of power to the citizenry that underlies our constitutional system. The

[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation or submission of this brief.

DKT Liberty Project is particularly involved in defending the right to freedom of speech, one of the most profound individual liberties.

The Los Angeles ordinance at issue here forbids selling books and previewing videos – items protected by the First Amendment – in the same store. Moreover, the ordinance does so without a shred of evidence that a store selling books and videos causes greater secondary effects than a store selling either item standing alone. Because of The DKT Liberty Project's strong interest in free speech and in the protection of citizens from such government overreaching, it is well situated to provide this Court with additional insight into the issues presented in this case.

SUMMARY OF ARGUMENT

The First Amendment protects citizens against government infringements on speech. Consequently, this Court has held that all restrictions of speech, both burdens and bans, must survive careful scrutiny. The sexually oriented literature and videos carried at plaintiffs' bookstores are unquestionably protected speech under the First Amendment. Because the Los Angeles ordinance prohibits plaintiffs from distributing more than one form of protected expression in their stores, it unconstitutionally burdens that expression. Specifically:

1. The ordinance restricts distribution of nonobscene, sexually oriented literature and videos. Such restrictions can only be justified as content-neutral regulations if they are designed not to restrict access to constitutionally protected expression, but to deter identified adverse secondary effects that stem from the business.

2. There is substantial evidence that adult businesses *do not* cause negative secondary effects on neighborhoods where they are located. Therefore, a city cannot presume, assume, or infer such effects, but must rely on evidence of secondary effects reasonably relevant to the problem the city addresses. Here, to justify the prohibition against selling two forms of sexually oriented speech in one store, the evidence must demonstrate that one store selling both products creates negative secondary effects like those created by two stores close together selling one product each. In so doing, the city may not point to evidence it did not actually consider.

3. Los Angeles has no evidence to justify the ban. The study on which the city relied does not even address the issue, and studies from other cities provide no evidence that selling two items in a store creates additional secondary effects. In the absence of such evidence, the regulation is not an acceptable "time, place, and manner" regulation and is instead an unconstitutional content-based restriction on speech.

ARGUMENT

I. THE LOS ANGELES ORDINANCE RESTRICTS PLAINTIFFS' ABILITY TO ENGAGE IN PROTECTED SPEECH AND MUST BE SUBJECTED TO HEIGHTENED SCRUTINY.

"[T]he free publication and dissemination of books and other forms of the printed word furnish very familiar applications of [First Amendment] constitutionally protected freedoms." *Smith v. California*, 361 U.S. 147, 150 (1959). This Court has long recognized that the sale of books is at the heart of the activities protected by the First Amendment's proscription against abridgements of the freedom of speech and the press. *See, e.g., id.*; *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Kaplan v. California*, 413 U.S. 115, 119 & n.3 (1973); *Bantam*

Books, Inc. v. Sullivan, 372 U.S. 58, 70-71 (1963). Given the retail bookseller's critical role in the dissemination of books to the public, governmental restrictions on a bookseller's ability to distribute books must be closely examined to ensure that the First Amendment rights of the bookseller (and of the members of the public that may wish to read the books at issue) are not infringed. *See Smith*, 361 U.S. at 154; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 76-77 (1976).

Motion pictures are also "a significant medium for the communication of ideas." *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495, 501 (1952). Thus, like books, films and motion pictures merit the full protection of the First Amendment. *See id.* at 502; *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *Young*, 427 U.S. at 76-77 (Powell, J., concurring); *Vance v. Universal Amusements Co.*, 445 U.S. 308, 316 (1980). Theater owners, like booksellers, are often uniquely positioned to defend those rights. *See Young*, 427 U.S. at 77.

The sexually oriented nature of the books and movies sold by plaintiffs does not vitiate the constitutional protection. "Nudity alone does not place otherwise protected material outside the mantle of the First Amendment," *Schad*, 452 U.S. at 66 (internal quotations and citation omitted), and this Court has therefore repeatedly acknowledged that nonobscene sexually explicit books, magazines, and films retain their protected status. *See, e.g., United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) ("[N]onobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment"); *United States v. Playboy Entertainment Group Inc.*, 529 U.S. 803, 811 (2000) (recognizing that sexually explicit cable programming was protected speech); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (adult entertainment industry members affected by zoning ordinance had valid First Amendment interest); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S.

41, 54 (1986) (describing adult theaters as a "speech-related business"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975) (ordinance preventing drive-in theaters from showing films containing nudity violated First Amendment).

The fact that some people might find such speech "highly offensive" or indecent does not remove the constitutional protection. *Playboy*, 529 U.S. at 811. To the contrary, unpopular or controversial speech requires the most vigilant protection under the First Amendment, because that speech is particularly likely to be targeted by the government. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed . . . that consequence is a reason for according it constitutional protection.") (internal quotations and citations omitted); *see also Lawson v. Murray*, 515 U.S. 1110, 1114 (1995) (Scalia, J., concurring in denial of certiorari); *Young*, 427 U.S. at 87 ("[I]t is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height.") (Stewart, J., dissenting). Indeed, the very purpose of the First Amendment is to prevent governmental bodies from restricting speech on the basis of "esthetic and moral judgments about art and literature." *Playboy*, 529 U.S. at 818. "What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *Id.*

Consequently, where cities restrict adult businesses purportedly to combat secondary effects resulting from those businesses, this Court has mandated close First Amendment scrutiny. It has recognized that the regulated businesses are engaged in protected speech, and that the restrictions "do[] not appear to fit neatly into either the 'content-based' or the 'content-neutral' category." *Renton*, 475 U.S. at 47; *see also*

Young, 427 U.S. at 63 & n.18. Accordingly, only when the ordinance is in fact content-neutral, and is truly aimed at reducing secondary effects, rather than suppressing speech, will the Court apply the "time, place, and manner" review. Under that standard, the Court will uphold restrictions if they "are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton,* 475 U.S. at 47.

The argument that location ordinances target secondary effects, and not the speech distributed by adult businesses, was first accepted in *Young*. But even while accepting that argument, the *Young* court signaled its concern with the efficacy of such restrictions: "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." 427 U.S. at 71. Over the quarter of a century since *Young*, numerous cities have restricted the location of adult businesses. Some cities have dispersed adult businesses, and some have concentrated them in one area. Other cities have tried limitations on operating hours and other forms of regulation of the businesses. In short, the location and operation of adult oriented businesses have been significantly regulated for twenty-five years. Those regulations have substantially affected the practices and effects of such businesses. The period of "reasonable" experimentation the plurality allowed in *Young* has run its course, and there is now a long record of regulatory efforts which can be evaluated. *Cf. Hart Book Stores, Inc. v. Edmisten,* 612 F.2d 821, 832 (4th Cir. 1979) (noting in 1979 that "the lack of a long record of regulatory efforts underscores the need for a chance for reasonable experimentation"). Therefore, new and ever more burdensome restrictions on adult businesses engaged in First Amendment speech must be, in fact, designed to ameliorate identified secondary effects, and not simply attempts to regulate disfavored speech out of existence. Because plaintiffs' bookselling and video-showing activities squarely fit the

definition of protected speech, the Los Angeles ordinance cannot survive unless it truly targets identified secondary effects that flow from combining those activities in one store.

II. IF THE ORDINANCE IS AIMED AT "SECONDARY EFFECTS" ATTRIBUTABLE TO COMBINED BOOKSTORE/VIDEO ARCADES, THERE MUST BE EVIDENCE OF THOSE EFFECTS.

Seeking to justify its ordinance as a time, place, and manner restriction aimed at deterring the secondary effects that accompany a concentration of adult businesses, Los Angeles claims that the ordinance is comparable to those upheld by this Court in *Yourg v. American Mini Theatres, Inc*, and *Renton v. Playtime Theatres, Inc.* But this defense fails for two reasons. First, the Los Angeles ordinance challenged in this case goes well beyond the ordinances upheld in those cases and restricts not only the *location* of an adult business, but the *materials* it can sell. The ordinance does not merely prevent an adult bookstore from being located adjacent to a video arcade, it prohibits the plaintiffs from engaging in additional protected speech activities within their legally located bookstores.

Second, the Los Angeles ordinance is not supported by relevant evidence of secondary effects. Los Angeles officials did not examine whether selling books and showing videos in the same store generates the secondary effects that result from a concentration of separate adult businesses. Nor did they review any evidence or studies from other cities or any judicial opinions that addressed that question. The city had no basis to conclude that a combined bookstore/video arcade would cause more secondary effects than a separate bookstore or arcade. Thus, the ordinance fails the *Renton* test.

A. Secondary Effects Cannot be Presumed.

This Court has recognized repeatedly that "mere conjecture" is "[in]adequate to carry a First Amendment burden." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000); *see also, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must . . . demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way."). This is so even though a legislature is permitted to base other non-speech regulations on conjecture or even a "gut feeling" about both the existence of a problem and the ability of the regulation to address the problem. *See, e.g., United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (under rational basis review it is "constitutionally irrelevant" whether the legislature actually relied on the proffered justification). Where speech is at issue, the critical requirement of actual evidence helps to ensure that the asserted governmental interests in fact are substantially advanced by the challenged law, and are not mere pretexts used to justify restrictions of unpopular speech. Thus, under the First Amendment, a city must rely on evidence reasonably relevant to the problem it addresses. *Renton*, 475 U.S. at 51-52. Indeed, "application of an intermediate scrutiny test to a government's asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 311 (2000) (Souter, J., concurring and dissenting in part).

Applying these principles in cases involving regulation of adult businesses, this Court has consistently required *evidence* of the secondary effects the government is trying to reduce. In *Young*, for example, "[t]he record disclosed a factual basis" for the city's conclusion that concentrations of adult businesses

would increase crime and negatively impact the neighborhoods, and supported the city's claim that the restrictions were justified by the city's interest in preserving the character of its neighborhoods. 427 U.S. at 71 (plurality opinion). Specifically, the city reviewed "reports and affidavits from sociologists and urban planning experts. . . on the cycle of decay that had been started in areas of other cities, and that could be expected in Detroit, from the influx and concentration of [adult] establishments." *Id.* at 82 & n.4 (Powell, J., concurring). The evidence indicated that the threat was caused by the concentration of adult theaters, as opposed to a concentration of other types of theaters. *See id.* Moreover, the Court indicated that the evidence was essential to surviving constitutional scrutiny – as Justice Powell observed, "[t]he case would have presented a different situation" if Detroit had attempted to restrict "types of theaters that had not been shown to contribute to the deterioration of surrounding areas." *Id.* at 82.

Similarly, in *Renton*, the Court did not allow a city to *assume* that adult businesses created negative secondary effects. To the contrary, the Court held that while a city need not always conduct its own study, it must rely on "*evidence* . . . reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52 (emphasis added). Renton met that requirement. The preamble to the regulations recited the evidence on which Renton relied: studies produced by, and the experience of, the nearby city of Seattle, a report from the city attorney's office, and the Washington Supreme Court's "detailed findings" regarding Seattle's evidence of adverse secondary effects. *See id.* at 44, 51-52. The Court concluded that Renton had relied on sufficient evidence to meet the requirements of the secondary effects test, and that the ordinance affected "only that category of theaters *shown to produce the unwanted secondary effects.*" *Id.* at 51-52 (emphasis added).

These precedents, which are firmly grounded in basic principles of First Amendment jurisprudence, preclude acceptance of Petitioner's suggestion that there should be some sort of presumption that adult businesses create secondary effects as a matter of law, fact, or "common sense." First, there is significant evidence that many adult businesses *in fact do not* create more secondary effects than other businesses. In Fulton County, Georgia, for example, the locations of various adult businesses were analyzed for crime incidence and property value, but the city "found no evidence of the secondary effects with which the Board was purportedly concerned." *Flanigan's Enters., Inc. v. Fulton County*, 242 F.3d 976, 986 (11th Cir. 2001). Specifically, "[l]ocal studies, including those commissioned by the county itself, revealed that the [adult] Clubs had less, up to half, the incidence of crime than establishments that did not offer nude dancing, property values had increased in the Clubs' surrounding neighborhoods, and the physical maintenance of surrounding buildings showed no quantifiable blight." *Id.* Recently conducted studies of the neighborhoods surrounding adult dance clubs in Charlotte, North Carolina yielded similar results. Researchers concluded that areas within close proximity (500 or 1000 feet) of the Charlotte clubs experienced fewer reported crime incidents than the comparable areas surrounding the study's control sites. *See* Kenneth C. Land, Jay R. Williams, & Michael E. Ezell, *Are Adult Dance Clubs Associated With Increases In Crime In Surrounding Areas?, A Secondary Crime Effects Study in Charlotte, North Carolina* (July 6, 2001) (unpublished manuscript on file with Jenner & Block, LLC).[2] A case study of the perceptions of residents and business operators within a 1000 foot radius of the city's clubs revealed that the clubs'

[2] The authors of this study provided a draft to counsel for *amicus curiae* to be used in connection with this brief. Counsel will shortly lodge a copy of the final study with this Court.

resident and business neighbors did not believe that the clubs had adversely affected their neighborhoods. *See* Judith Lynne Hanna, Ph.D, *Reality & Myth, What Neighbors Say About Exotic Dance Clubs, A Case Study in Charlotte, North Carolina* (August 3, 2001) (unpublished manuscript on file with Jenner & Block, LLC).[3]

Moreover, even the various studies relied on by municipalities and counties to demonstrate secondary effects candidly admit there is significant evidence that areas with adult businesses do not show secondary effects, and that even when neighborhood deterioration is present, their studies do not establish a relationship between the deterioration and the adult businesses. Indeed, in the Los Angeles study cited by Los Angeles to support *this* ordinance, the authors concluded that they found "*insufficient evidence* to support the contention that concentrations of sex-oriented businesses" caused or could explain the patterns of change in the assessed valuations. Dep't of City Planning, City of Los Angeles, *Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles* at 25 (1977) (emphasis added) ("LA Study"). The same report also admitted that the planners found no significant difference in crime rates between the census tracts encompassing adult businesses and tracts that did not. *Id.* at 48-50.

These studies are not alone. A study conducted a year later in St. Paul, Minnesota found absolutely no relationship between sexually oriented businesses and neighborhood deterioration, as measured by crime counts and housing values. *See* Bryant Paul, Daniel Linz, and Bradley J. Shafer, *Government Regulation of "Adult" Businesses Through Zoning*

[3] The author of this study provided a draft to counsel for *amicus curiae* to be used in connection with this brief. Counsel will shortly lodge a copy of the final study with this Court.

and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects, 6 Comm. Law and Policy 355, 376-77 (Spring 2001) (citing City of St. Paul, Minnesota, *Neighborhood Deterioration & the Location of Adult Entertainment Establishments in St. Paul* (1978)). And an Indianapolis study in 1984 actually found lower major crime rates in a 1000 foot radius from all adult businesses than a similar radius in control areas where adult businesses were not located. *See* Dep't of Metro. Dev., Div. Of Planning, *Adult Entertainment Businesses in Indianapolis – An Analysis* at 22-24 (1984). Even the infamous study of Times Square in New York City contained evidence that the property value of particular blocks *with* adult establishments increased at a rate higher than those blocks *without* adult establishments. City of New York, Dep't of City Planning, *Adult Entertainment Study* at 41 (1994).

In more general terms, the City of Bellevue, Washington study concluded that the adult businesses in that city did not create any negative secondary effects. City of Bellevue, Wash., Planning Dep't, *A Study on the Need to Regulate the Location of Adult Entertainment Uses* at 56 (1988) ("Bellevue Study"). Planners in El Paso, Texas concluded that their analysis did "not in itself establish an effectual relationship between adult entertainment businesses and crime rates." Dep't of Planning, Research and Dev., City of El Paso, Texas, *Effects of Adult Entertainment Businesses on Residential Neighborhoods* at 25 (1986). And many of the studies which purport to find a causal relationship between adult businesses and secondary effects are significantly flawed. Indeed, in a review of the ten studies cited most often by cities to support restrictive zoning laws, three scientists concluded that only one of them was sufficiently sound as scientific evidence to be admissible evidence. *See* Paul, Linz, and Shafer, *supra*. In the face of this evidence, neither cities nor courts can simply assume that adult

businesses create sufficient secondary effects to justify restrictions that apply solely to them.

Our point is not that these studies could never support a city ordinance limiting the location of adult businesses. Rather, the studies themselves demonstrate that there is substantial evidence on both sides of the issue. Thus, the question of whether and when adult businesses cause secondary effects is one of fact that cannot be resolved by assumptions or presumptions, or without reference to any evidence.

Additionally, even if cities could have reasonably assumed, prior to any zoning regulation, that the concentration of adult businesses created more adverse secondary effects than non-adult businesses, that assumption loses any force as a justification for further regulation after a quarter-century of regulating the location of those adult businesses. The Los Angeles ordinance requiring dispersal of such businesses has been in effect since 1978. Presumably that dispersal has ameliorated the secondary effects that concerned the city in the first place. In short, without some evaluation of whether the ordinances in effect for the last twenty-three years have had some effect, Los Angeles cannot look to information collected twenty-five years ago to justify creating increasingly narrow niches for the expression of sexually oriented speech.

In addition to the effect of these legal restrictions, the nature of adult businesses has changed dramatically over the past twenty-five years. In contrast to the seedy strip joints of previous decades, many shops and clubs are now upscale. A well-run "gentleman's club" can generate annual revenues of $5 million. Eric Schlosser, *The Business of Pornography*, U.S. News & World Rep., Feb. 10, 1997, at 42. And Americans now spend more money at these exotic dance clubs than at Broadway, off-Broadway, regional and non-profit theaters, opera, ballet, jazz, and classical music performances combined.

See id. Due to city and state ordinances, many of these clubs serve only juices and sodas–no alcohol–thus reducing further the likelihood of secondary effects attributable to bars. These changes, both legal and social, must be considered when a city seeks to impose more restrictions. Thus, without some evidence that additional secondary effects now require additional restrictions, including limiting the kind of speech an owner can make available in one store, the First Amendment forbids additional restrictions.

Moreover, as we discuss in the next section, the evidence must be compared with the particular form of regulation sought to be justified. A study supporting dispersal of adult businesses cannot be assumed to provide equally strong support for a law restricting the operations of *a single* business. Various *amici* suggest that the Los Angeles ordinance is justified because it is "logical" to conclude that combinations of adult uses would attract a larger number of customers than solitary uses. *See* Brief of *Amici Curiae* American Planning Association and Community Defense Counsel in Support of the City of Los Angeles at 13.[4] But this conclusion would also justify ordinances allowing bookstores to sell only books by certain authors, or books whose titles begin with certain letters, or even only 25 books at a time on the theory that the fewer the books, the fewer the customers, and the fewer the secondary effects. The First Amendment requires that a city restricting speech because the speech causes negative secondary effects have a factual basis to connect the rationale to the regulation – the evidence must be relevant to the problem the city addresses. *Renton*, 475 U.S. at 51-52. Any lesser requirement, or any

[4] *See also, e.g.*, Brief of Capitol Resource Institute & Campaign for California Families as *Amicus Curiae* In Support of Petitioner, at 6 (suggesting that a city's finding of-secondary effects may be based on "various unprovable assumptions"); Brief *Amicus Curiae* of Morality in Media, Inc. In Support of Petitioner, at 10 (asserting that municipalities may rely on their "collective common sense").

presumption of such effects, would impermissibly allow cities to restrict sexually oriented speech for any reason at all.

B. The City Must Actually Have Relied Upon the Evidence it Identifies.

Petitioner asserts that the law permits cities to defend their ordinances with post-hoc rationalizations presented by counsel, as opposed to the evidence on which the city actually relied. That argument is groundless. This Court has never upheld a zoning restriction affecting protected speech simply because some secondary effects evidence existed somewhere that a city hypothetically *could* have found relevant. Instead, the Court looks at evidence on which the city *did* rely. *See, e.g.*, *Renton*, 475 U.S. at 50-52 (discussing evidence Renton "relie[d] upon"); *Young*, 427 U.S. at 80-81 (noting that the purposes of the ordinance were established before it was applied to adult businesses) (Powell, J., concurring). And in *Renton* the preamble to the ordinance stated that the relevant factors were considered *at the time the city drafted the ordinance.*[5]

Indeed, the rule could not be otherwise, unless, contrary to this Court's precedent, mere conjecture *is* sufficient to carry First Amendment burdens. Allowing cities to rely solely on post-hoc discoveries of counsel as the evidentiary justification for an ordinance restricting adult businesses would eviscerate the purposes of the secondary effects test. These ordinances single out sexually oriented businesses for disparate and burdensome treatment. Such restrictions are presumptively invalid content-based restrictions on speech unless they are in fact designed to address actual secondary effects of such

[5] Thus, although the evidence that the City of Renton reviewed was not incorporated into the record until after litigation began, the preamble established that the evidence was considered when the ordinance was enacted.

businesses. Requiring a city to show that it in fact reasonably expected negative secondary effects to flow from unregulated locations of adult businesses, and that it relied on these secondary effects when it drafted the ordinance, prevents a city from targeting these businesses based on their content, and then hoping that creative lawyers can supply a hypothetical content-neutral justification for their actions.

III. THERE IS NO EVIDENCE THAT SHOWING VIDEOS IN A BOOKSTORE RESULTS IN ADDITIONAL SECONDARY EFFECTS THAT COULD JUSTIFY THE ORDINANCE.

A. Evidence of The Secondary Effects of Multiple Separate Adult Businesses in Close Proximity Cannot Justify the Los Angeles Ordinance.

If a city aims to reduce secondary effects, the secondary effects evidence on which the city relies must be tied to the activity that the city seeks to restrict. *See Renton*, 475 U.S. at 51-52. But the Los Angeles ordinance goes far beyond traditional zoning ordinances that regulate concentration or dispersal of multiple adult businesses, and instead regulates the material that can be sold within a *single* adult business. Petitioner claims that the city had adequate evidence that a concentration of adult businesses can cause adverse secondary effects. *See* Petitioner's Br. at 27-28. But even if that were true, which *amicus* does not concede, that evidence is not relevant because it does not demonstrate any link between the secondary effects of concentration and the effects of a single business that sells books and shows videos.

The relevant secondary effects here are different than those at issue in *Young* and *Renton*. In those cases, the relevant question was whether the location of multiple adult businesses caused *any* secondary effects, and if so, whether ordinances

restricting their concentration would further the city's interest in preventing those effects. The constitutional validity of this ordinance turns on a different question: Does evidence show that an adult bookstore that also contains video viewing booths generates more secondary effects than a separate bookstore or arcade?

This type of particularized finding is especially important where, as here, a city prohibiting the sale of two forms of expression in one store is regulating against the backdrop of longstanding zoning laws that already restrict the location of adult businesses. Los Angeles has already significantly burdened the availability of sexually oriented speech based on its view that concentrations of multiple adult businesses have adverse secondary effects on neighborhoods. To justify the additional significant burdens it proposes now, it must point to some evidence supporting its belief that imposing the additional restrictions will materially advance either the substantial interest to which the existing restrictions were directed, or another government interest. As set forth below, Los Angeles has failed to do this.

B. The Los Angeles Study Does Not Address Whether a Single Adult Bookstore that Also Sells or Shows Videos is Likely to Create Secondary Effects Similar to Those Created by Multiple Adult Businesses.

Both the district court and Ninth Circuit concluded that "[t]he *only* evidence relied upon by Los Angeles to justify the 1983 amendments to section 12.70(c) is the 1977 study (the 'Study'), which was used as the basis for the enactment of the original regulations." *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719, 724 (9th Cir. 2000) (emphasis added). As the city did not rely on any other evidence, this Court's analysis of the constitutionality of the ordinance should begin and end with a review of that study. Although Petitioner

asserts that this study supports the ordinance, *see* Petitioner's Br. at 27-28, the study never even *considers* whether a combined bookstore/video arcade causes the secondary effects that accompany a concentration of separate adult businesses, let alone presents any evidence related to that question.

The 1977 LA Study examined whether the concentration of multiple sexually oriented businesses caused blight or deterioration in the areas where they were located. It compared the crime rates and property values of five areas with multiple adult businesses to areas of the city without adult businesses. The city sampled public opinion from realtors and residents, as well as more objective public information regarding property assessments and the incidence of crime. In addition, the study noted the experiences of, and ordinances enacted by, other cities restricting the location of adult businesses.

The LA Study "addressed the secondary impact not of single adult business establishments, but of concentrations of separate, individual adult businesses." *Alameda Books*, 222 F.3d at 724. Indeed, for purposes of describing the single businesses then existing, the study identified "massage parlors," "bookstores/arcades," "theaters," and "adult motels." LA Study at 22-a, 22-b. Obviously, bookstore/arcades were single businesses selling several products – indeed, the very facades of those businesses pictured in the study said as much.[6] Despite this knowledge, the authors evaluated only the effects of concentration of those individual stores with regard to *other separate businesses*. The study did not purport to determine whether a single bookstore/arcade created any secondary effects, let alone whether such secondary effects would be comparable to those resulting from two separate businesses.

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[6] One sign advertises an "Adult Bookstore" "Adult theatre" "films, marital aids, mag[azine]s." Another offers a "25 ¢ movie arcade" "books magazines marital aids film." LA Study at 6(a) - 6(b).

Notwithstanding the utter lack of any evidence pertaining to the effects of a combined bookstore/arcade, the city of Los Angeles now asserts that the LA Study supports the ban on bookstores showing or selling videos. According to Petitioner, the city (and this Court) could simply assume that combined bookstore/arcades are functionally equivalent to two separate businesses within close proximity to each other, and the LA Study is relevant because it addresses the effects of multiple separate establishments. That assumption, however, is the very conclusion for which the city needs evidence. The requirement of evidence cannot be "assumed" away.

C. Studies Conducted By Other Cities Do Not Provide Evidence That A Bookstore Showing Videos Creates The Secondary Effects of Multiple Adult Businesses.

Nor can Los Angeles rely on studies done by other cities. First, as discussed above, the city cannot rely on studies it did not consider. *See* Part II. B *supra*. Second, Los Angeles cites no other such studies to support its position. This is not surprising, since none of the major studies even purport to address the issue of whether a single bookstore showing movies creates more secondary effects than a single bookstore or arcade. We have reviewed 30 such studies, available in a packet that the National Law Center for Children and Families regularly makes available to city governments.[7] Of these studies, 8 are among those that have been identified as the ten most commonly cited secondary effects studies. *See* Paul,

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[7] The National Law Center offers information to assist cities in drafting ordinances that restrict sexually oriented businesses. Among other things, the organization's website provides summaries of secondary effects studies, identifies "crucial considerations for a constitutional and effective sexually oriented business ordinance," and provides a fact sheet with excerpts from the organization's "Legal Manual on How to Enact Sexually Oriented Business Ordinances." *See* http://www.nationallawcenter.org.

Linz, & Shafer *supra* at 367-68 (listing most frequently cited studies and cities that relied on them). None of the studies could provide a sufficient evidentiary basis to support the ordinance.

Like the 1977 LA Study, most of the other studies focus on whether there are secondary effects attributable to adult businesses generally, or to the concentration of multiple businesses within a specified geographic area. Several studies conclude that dispersal laws would further the city's interest in preventing the creation of a "skid row" area with high crime and low property values. *See, e.g.*, Marlys McPherson & Glenn Silloway, Minnesota Crime Prevention Center, Inc., *An Analysis of the Relationship Between Adult Entertainment Establishments, Crime, and Housing Values* (1980). But these studies generally group "adult businesses" together and do not consider whether a single business that sells more than one type of item creates similar secondary effects to multiple stores selling one type each. *See, e.g.*, Peter Malin, *An Analysis of the Effects of SOBs on the Surrounding Neighborhoods in Dallas, Texas* (1997); Houston City Council, Comm. on the Proposed Regulation of Sexually Oriented Businesses, *Legislative Report on an Ordinance Amending Section 28-73 of the Code of Ordinances of the City of Houston, Texas; Providing for the Regulation of Sexually Oriented Commercial Enterprises, Adult Bookstores, Adult Movie Theatres and Massage Establishments; and Making Various Provisions and Findings Relating to the Subject* (1983); Planning Dep't, City of Phoenix, *Adult Business Study* (1979); St. Croix County Planning Dep't, *Regulation of Adult Entertainment Establishments in St. Croix County Wisconsin* (1993); Robert W. Thorpe, R.W. Thorpe & Assoc., Inc., *Des Moines Adult Use Study* (1984).

Also like the LA Study, several studies indicate that their authors were plainly aware that adult bookstores often sell and

preview videos or contain other adult uses. For example, a 1977 Amarillo, Texas report on zoning identified seven adult businesses within the city, three of which were adult theaters that also carried books, magazines, and adult novelties, and four of which were adult bookstores with space for other adult materials. *See* Planning Dep't, City of Amarillo, Texas, *A Report on Zoning and Other Methods of Regulating Adult Entertainment in Amarillo* at 11 (1977). Similarly, in 1986, Austin, Texas recognized that many adult bookstores also sell novelty items, other adult materials, and contain peep shows, but classified these businesses simply as adult bookstores, not multiple businesses. *See* Office of Land Dev. Servs., *Report on Adult Oriented Businesses in Austin* at 6 (1986). In 1988, the city of Bellevue, Washington recognized that the adult bookstores in Seattle often contained peep shows, and noted that two of the three adult retail stores within Bellevue also offered video cassettes for rental or on-premise peep shows. *See* Bellevue Study at 18, 43. Similarly, a 1977 Cleveland Police Department report describing police experience with adult businesses notes that the city contains 26 adult businesses, eighteen of which are "bookstores with peep shows." *See* Captain Carl I. Delau, *Smut Shop Outlets, Contribution of these Outlets to the Increased Crime Rate in the Census Tract Areas of the Smut Shops* at 1 (1977). Like Los Angeles, however, these cities analyzed each mixed-use business as a single business and examined the concentration of multiple single businesses, not the concentration of product lines in a single store.

None of these studies identify any heightened secondary effects attributable to a combined bookstore/video arcade or indeed to any combination of adult businesses in one store. To the contrary, to the extent they comment at all on the secondary effects of bookstores and arcades, they often conclude that such businesses are the least troublesome among the various types of adult businesses. *See, e.g.*, Newport News Dep't of Planning

and Dev., *Adult Use Study* at 8 (1996) (noting that among adult entertainment businesses, bookstores, adult merchandise, and video stores had the fewest police calls).[6] Thus, the secondary effects studies of other cities simply provide no evidence that could justify the Los Angeles ordinance.

D. The Fourth Circuit's *Hart* Decision Does Not Provide Evidence of Secondary Effects Justifying the Ordinance.

Like the studies conducted by Los Angeles and other cities, the judicial opinion in *Hart Book Stores, Inc. v. Edmisten* also fails to provide Los Angeles with sufficient evidence. At the outset, although Petitioner repeatedly suggests in its brief that Los Angeles relied on *Hart*, both the district court and the Ninth Circuit made the factual finding that the city relied only on the LA Study. As discussed above, Petitioner's statement that the opinion *existed* at the time the City considered the amendments to section 12.70, *see* Petitioner's Br. at 7, is not enough; the only relevant evidence is that which the city actually considered. *See* Part II. B *supra*. However, even if the city had considered *Hart* when enacting the ordinance, that case would not provide evidence to justify the ordinance.

Hart, a pre-*Renton* case, involved a challenge to a North

[6] Out of the thirty studies, only one even arguably approached the question of whether a combined-use adult business created additional secondary effects. But even if that study had been before the Los Angeles Council – and it was not – the study simply opines, with no objective basis for doing so, that "a single *large* adult entertainment complex . . . *could* create the same conditions" as those created by the four currently existing adult businesses at a particular location. *See* Adult Entm't Planning Div., Saint Paul Minnesota, *Adult Entertainment, Supplement to the 1987 Zoning Study* at 6 (1988) (emphasis added). Such a conclusion is not evidence, nor does it have any bearing on whether a single bookstore/arcade would create more secondary effects than a bookstore or arcade standing alone.

Carolina statute that prohibited two "adult establishments" from being in one building.[7] Plaintiffs challenged the statute on First Amendment grounds. Although the legislative history and the trial record contained no evidence of studies or judicial opinions identifying any secondary effects, the Fourth Circuit concluded that the legislature *could* have reasonably concluded that combined-use businesses "tended to produce secondary effects destructive of the general quality of life in the neighborhood." 612 F.2d at 828.

Despite the facial similarity in the provisions, the *Hart* opinion cannot provide the evidence necessary to support the Los Angeles ordinance. First, although this Court has recognized that a city could rely on a judicial opinion as a source of secondary effects evidence, it has not held that a judicial opinion alone would be sufficient to justify a zoning restriction applicable to adult businesses. *See Renton*, 474 U.S. at 52 (approving Renton's reliance on a Washington Supreme Court opinion in addition to studies conducted by Seattle and other cities).

Moreover, even if an opinion alone could be adequate evidence, the *Hart* opinion does not include the type of "detailed findings" apparent in the Washington Supreme Court opinion approved in *Renton*. That opinion recounted the "extensive testimony regarding the history and purposes of these ordinances. . . expert testimony on the adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts . . . [and] detailed findings . . . that the location of adult theaters has a harmful effect on the area and contribute to neighborhood blight." *Renton*, 475 U.S. at 51 (quoting *Northend Cinema, Inc. v.*

[7] The regulations did not prevent adult businesses from concentrating in close proximity to each other or near a school, residential area, or other special use.

Seattle, 90 Wash. 2d 709, 713, 585 P.2d 1153, 1156 (1978)). In marked contrast, the opinion in *Hart* showed only that the senator sponsoring the bill read a report recounting one county's single health inspection of five businesses containing video arcades. *See* 612 F.2d at 828-29 & n.9. The report contained no evidence or even conclusions about any secondary effects since it reported only on the interior condition of the stores. Nevertheless, despite the lack of *any* evidence relating to secondary effects, or any legislative findings of secondary effects, the Fourth Circuit hypothesized that the "legislature *could* reasonably have determined that the development of [multi-use adult businesses] tended to produce secondary effects . . . ." *Id.* at 828-29 (emphasis added). While such deference may have been acceptable before *Renton*, it cannot suffice under current standards. Accordingly, even if Los Angeles had relied on *Hart*, that case provides no evidentiary basis for its conclusion that prohibiting bookstores from showing videos will lessen the secondary effects attributed to a concentration of separate adult businesses.

CONCLUSION

Because the City of Los Angeles had no evidence that selling two products in a single business created secondary effects comparable to the secondary effects of multiple adult businesses concentrated together, section 12.70(c) cannot constitutionally be applied to prevent plaintiffs from disseminating two protected forms of speech. Despite the pleas of *amici curiae* that the Court simply "presume" the existence of such secondary effects, both the First Amendment and this Court's precedent require that Los Angeles rely on evidence relevant to the secondary effects its ordinance purports to combat. In light of Los Angeles' failure to do so, the amended ordinance cannot withstand constitutional scrutiny, and the Ninth Circuit's opinion should be affirmed.

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